CRITICAL EVALUATION OF THE RIGHTS AND REMEDIES OF OWNERS OF CARGOES CARRIED BY SEA UNDER ENGLISH LAW

By

RAID AL- ZUDE

School of Law

University of Bristol

A Thesis submitted to the University of Bristol in accordance with the requirements of the degree of Doctor of Philosophy in the Faculty of Law

3rd of September 2003

ABSTRACT

This thesis examines two critical issues in the law of carriage of goods by sea. First, does English law give adequate means of recovery against sea carriers to all parties whose goods may be lost or damaged during sea carriage? More, specifically, how do third parties claiming under combined transport bills of lading or under bills of lading issued by a non- vihicale owning carrier (NVOC) fall within the provisions of COGSA 1992? These issues will be analysed in the first two chapters of the thesis with the related issue of cargo owner's liability to the carrier being addressed in the third chapter. If the answer is negative, what are the obstacles such claimants might face in proceeding non- contractually in bailment or negligence or by way of implied contract? This issue is addressed in chapter five. Electronic documentation raises difficult and novel issues relating to title to sue of a different order to the issues relating to paper documents, which are addressed in the first three chapters. These will be addressed in the forth chapter. Secondly, does English law have adequate mechanisms for enabling sub- contractors of the sea carrier to rely on the exceptions and limitations available to the head carrier under the Hague and Hague- Visby Rules? This question is addressed in the sixth chapter where I shall analyse the doctrines of bailment and sub- bailment on terms, the Himalaya clause and circular indemnity clauses, as well as the Contracts (Rights of Third Parties) Act 1999.

This thesis is focused on doctrinal rather than empirical issues. The main sources will therefore be decided cases and commentary in academic journals, textbooks and monographs. Throughout, English law will be compare with two other systems that address the two questions under consideration in the thesis. First, there is US law. I have chosen this because I wanted to compare English law with solutions adopted by another law jurisdictions. I chose the US law because there is a greater difference between its solutions and those adopted by common wealth jurisdictions such as Australia, New Zealand, Singapore and Hong Kong. Not only does the US law on privity of contract, with its doctrine of third party beneficiary differ significantly form its English law equivalent, so, too, does the statutory solution adopted in the US. The Pomerene Act has many points of differences from COGSA 1992 (and Bills of Lading Act 1855 that preceded it) in the way it grants third parties rights of suit under bills of lading. It also has no provisions regulating the liability of third parties to the carrier. This issue is left to the common law and the doctrine of implied contract. The differences make US law a potentially fruitful point of comparison to the solutions adopted by English law to the issue of title to sue. The other point of reference is the Draft Outline Instrument on Carriage of Goods by Sea, which is currently being developed under auspices of UNCITRAL which is continuing the work started by the CMI.

ACKNOWLEDGEMENT

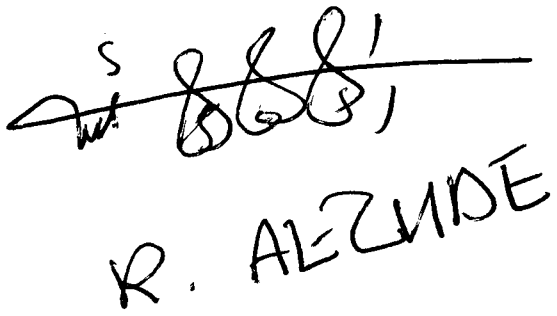
I wish to record my immense gratitude to my supervisor, Mr Simon Baughen, not only for his guidance, criticism and encouragement, but also for his patience during the course of this work.

My sincere thanks also go to those who have been of kind assistance in various ways and at various stages of this thesis. I would also like to thank the staff of the library at the Wills Library that I have consulted.

I am also grateful to my uncle, my brothers and my friends for their support.

I express my deepest gratitude to my father, my sister and my aunt, to whom this thesis is dedicated.

I hereby declare that the whole work contained in this thesis was my independent work. The views expressed in this thesis are my personal views and not those of the University of Bristol.



R. ALZUIDE

GENERAL INTRODUCTION

The first problem addressed in this thesis is the relationship between the carrier and third party owners of the cargo being carried. Those who suffer loss are generally not the parties who have made the initial contract of carriage with shipowner. Recovery from the shipowner is more attractive than recovery from other possible parties due to ability to get security for the claim by the arrest process. The basic privity problem has been solved by COGSA 1992 but there are still *lacunae*, especially as regards electronic bills, bills issued by nvocc's, combined transport bills. Claimants may also have problems when a charterer's bill is issued or when damage occurs after transhipment and the head bill contains a clause providing for carrier's responsibility to cease on discharge of goods from its vessel. If claimants fall outside COGSA 1992 how can they obtain rights of suit? Non-contractual actions, implied contract, 1999 Contracts (Rights of Third Parties) Act all offer, at best, a partial solution to this question.. Even if a claim falls within the 1992 Act, the way the Act operates may not always be satisfactory. For example, there is uncertainty as to the operation of s. 2 (4), whether *Leduc v Ward* still applies, and whether physical possession of the bill is essential to show that you are a 'lawful holder'. Also, there remain problems with the operation of s. 3 as regards transfer of liabilities. Did *The Berge Sisar* reach the right conclusion as regards the position of intermediate holders? Should liability as regards dangerous cargo ever be imposed on third parties? What exactly is the legal effect of 'freight pre- paid' clausing?

The second problem is the need to prevent non- contractual claims going outside the scope of COGSA 1971 or its equivalents, i.e. the Hague Rules. US COGSA 1936. The policy justification for this was put as follows by Lord Steyn in *The Nicholas H*

> "The dealings between shipowners and cargo owners are based on a contractual structure, the Hague Rules, and tonnage limitation, on which the insurance of international trade depends ..... The result of a

> recognition of a duty of care in this case will enable cargo owners, or rather their insurers, to disturb the balance created by the Hague Rules and Hague- Visby Rules as well as by tonnage limitation provisions, by enabling cargo owners to recover in tort against a peripheral party to the prejudice of the protection of shipowners under the existing system".

How successful is doctrine of bailment and sub- bailment on terms on achieving this goal?

Both problems will be examined from the following perspectives. Existing English law. US law, by way of comparison. Modifications made by COGSA 1971. Modifications made by way of the Hamburg Rules. Modifications made by way of the UNCITRAL Outline Draft Instrument on Transport Law (the 'Draft Instrument'). The purpose of the Draft Instrument is to consider areas of transport law, not at present governed by international liability regimes and thereafter to draft provisions to be incorporated in the proposed instrument including those relating to liability. Because of the multipurpose of the instrument, further work is now going on under the auspices of UNCITRAL.

Chapter one will study the significance of the bill of lading as between the original parties the carriage contract. Firstly, the bills' function as evidence of the carriage contract will be examined under both bills of lading and charter- parties. Secondly, the identification of the contractual carrier under the bill of lading will also be discussed by way of comparison with US law the Hamburg Rules and the Draft Instrument. Thirdly, the bills' function as documents of title will be examined to determine whether other documents, such as 'received for shipment' bills, could be considered as documents of title. Lastly, the different types of bills of lading will, briefly, be studied, as some of these types will, latter, be considered in more detail, to see whether these documents are included in any of the statutory modifications to the privity of contract doctrine.

In chapter two, transferring of contractual rights under COGSA 1992 will be discussed in relation to bills of lading, sea waybills and ship's delivery orders. The shipper's rights, as an original party to the carriage contract, are extinguished, which will

reveal some situations whereby the shipper would be denied a remedy against the wrongdoer carrier. I will also consider whether the title to sue problem created by *Grant .v. Norway* has been solved by virtue of s. 4 of the 1992 Act. The inclusion of other documents within the provisions of COGSA 1992 will also be considered, particularly in the light of the uncertainty as to whether these documents qualify as documents of title. All these issues will be considered by way of comparison with US law and the Draft Instrument.

The operation of s. 3 of the 1992 Act as regards transfer of liabilities to the holder of a bill of lading will be discussed in chapter three. The position of an intermediate holder will also be examined under both s. 3 (1) and s. 2 (5). Both the question of whether such a holder would be liable for the shipment of dangerous cargo and the effect of 'freight pre-paid' clausing will be discussed in more detail. These issues will be considered by way of comparison with the US law and the Draft Instrument.

The *lacunae* of electronic bills of lading will be discussed in chapter four since, to the date, the Secretary of State has not used his powers under s. 1 (5) of the 1992 Act to regulate electronic bills. The status of an electronic bill of lading must, therefore, be ascertained by reference to the common law. The Bolero bills of lading will be examined under the Bolero system in comparison its equivalent under the Draft Instrument. I shall also examine the UNCITRAL Modal Law on Electronic Bills of Lading as well as the CMI Rules on Electronic Bills of Lading.

Notwithstanding the substantial improvements made by COGSA 1992, there will still remain some claimants who fall outside its ambit. Such claimants will need to find alternative means of making recovery from the carrier. Therefore, the implied contract doctrine, Contracts (Rights of Third Parties) Act 1999, liability in negligence and the

doctrine of bailment on terms will all be examined in chapter five. The discussion will conclude with a comparison between with the Hamburg Rules and the Draft Instrument.

The need to prevent non- contractual claims from being the means of circumventing the carrier's exceptions and limitation of liability under COGSA 1971 will be discussed in chapter six. The doctrine of bailment and sub- bailment on terms, the Himalaya clause and Contracts (Rights of Third Parties) Act 1999 will therefore be examined as judicial and statutory attempts to resolve this problem. The thesis will examine the various problems that still remain in confining non- contractual claims within the framework of the Hague and Hague- Visby Rules. For example, why do jurisdiction clauses within a sub- bailment on terms but not a bailment on terms? Can a 'Himalaya' clause be redrafted so as to extend the protection of such clauses to sub- contractors? Can a claimant take free of the terms of any sub- bailment by basing its claim exclusively on the general duty of care in negligence? The discussion will initially be by way of comparison with US law, and will then conclude with a comparison with the Hamburg Rules and the Draft Instrument.

CHAPTER ONE: CONTRACTS FOR THE CARRIAGE OF GOODS BY SEA

Before examining how third parties may obtain contractual rights of suit under a bill of lading, one first needs to consider the contractual significance of the bill of lading as between the original parties to the contract of carriage.

1. 1. BILL OF LADING AS EVIDENCE OF THE CARRIAGE CONTRACT

The contract of carriage can be an express contract made between the shipper and the carrier before the loading starts, but it can, also, be an implied contract arising out of the acts of the shipper in tendering the goods for loading and the acts of the carrier in receiving the goods for shipment on board of the vessel.[1] It was held in *Union Industrielle et Maritime .v. Petrosul International Ltd., (The Roseline)*,[2] that there was no contractual relationship at all between the seller and the carrier if, in such case, the bill is not made out to the order of the seller, but names the buyer's bank as consignee. However, the decision, with respect, is to be doubted because the bill of lading in such case is prima facie evidence of the contract between the person named as shipper and the carrier for delivery of the goods to the consignee to whose order the bill is made out, or to such other person as the seller may direct. In *Spiliada Maritime Corp .v. Cansulex ltd*, Lord Goff said that "There is doubt whether a similar conclusion [*The Roseline*] would be reached in English Law".[3] Moreover, where the ship is chartered by the owner to a charterer, and then sub- chartered, by the charterer to the shipper, the relationship between the shipowner and the shipper, to whom the bill of lading may be issued, will be governed by the terms of the bill of lading. Therefore, it was held in *Heinrich Hanno & Co. BV .v. Fairlight Shipping Co. Ltd.*, that "Bills of lading were taken which named a specific port and, furthermore, they were taken

---

[1] See Cooke, J., (*et al*), *Voyage Charter*, London: Lloyd's of London Press Ltd., 1993, p. at 375, and Devlin J., in *Pyrene .v. Overseas Containers Ltd.*, [1954] 2 Q.B. 402 at pp. 426- 427. The implied contract was Devlin's alternative basis for his finding of a contract between fob seller and shipowner; his preferred basis was that of agency.

[2] [1987] 1 Lloyd's Rep. 18 at 22- 23.

[3] [1987] 1 Lloyd's Rep. 1 at 5.

in terms which created a new contractual nexus directly between Andre and the shipowners. This is not the situation where the bills of lading, when issued, were mere receipts as between the parties to the charter- party. The bill of lading does create a fresh nexus which did not previously exist. Therefore, they can not be treated as documents having no contractual significance; nor can the exercise of asking for and taking bills of lading in this form be regarded as insignificant".[4]

The contract of carriage comes into the existence before the issuing of the bill of lading, but the carrier and the shipper are aware that the goods will be carried according to the terms of the bill of lading customary in the trade. Subsequently, the terms of the bill of lading will be the terms of the carriage contract between the consignee and the carrier, where the bill of lading has been transferred to the consignee or endorsee. While it is admissible, as between the carrier and the shipper, to show that there are differences between the terms of the bill and the terms of the contract of carriage,[5] this is not the case as regards the endorsee or the consignee.[6] In these circumstances the bill of lading *is* the carriage contract and not merely evidence of its terms.[7]

1. 1. 1. CARRIAGE OF GOODS CONTRACT EMBODIED IN BILLS OF LADING

Every standard liner bill of lading contains the terms on which the goods are to be carried and delivered to their destination. However, the relationship between the shipper and the carrier is not regulated solely by the terms in the bill of lading, which is only *evidence* of the terms of their contract. Therefore, one of the parties can prove that the terms are partly

---

[4] [1985] 1 Lloyd's Rep. 231 at 235- 236.
[5] *The Ardennes,* [1951] 1 K.B. 55.
[6] *Leduc .v. Ward,* [1888] 2 Q.B.D. 475.
[7] For general details see Ivamy, H. E. R., *Payne and Ivamy's Carriage of Goods by Sea,* 13th Edition, London and Edinburgh: Butterworths 1989, at p. 81.

contained elsewhere, as in oral promises by the carrier. Thus, in *Crooks .v. Allan*,[8] Lush J. expressed the view that,

> A bill of lading is not the contract but only the evidence of the contract, and it does not follow that a person who accepts the bill of lading which the shipowner hands him, necessarily, and without regard to circumstances, binds himself to abide by all its stipulations. If a shipper is not aware when he ships them, or is not informed in the course of the shipment, that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a bill of lading which express before those terms.[9]

Thus, where the goods are lost or damaged before the bill of lading is issued, the shipper has a remedy against the carrier for breach of the carriage contract which was concluded before the issuing of the bill of lading. Moreover, the shipper can prove that the terms of the bill of lading do not comply with the terms of the initial carriage contract, between himself and the carrier, by submitting oral evidence to establish the precise terms of the contract. In *The Ardennes,*[10] the plaintiff was anxious to receive the consignment of mandarins from Cartegena to London, before 1 Dec., in order to avoid a threatened rise in import duty. The plaintiff explained that to the shipping agents who gave an oral commitment that the vessel would sail direct to London on the ground that the loading process finished on 22 Nov. But, at the same time, the vessel had a cargo for Antwerp and the bill of lading which was issued contained a liberty clause which entitled the vessel to call at any intermediate ports on the voyage to London. The vessel reached London on 4 Dec., as a result of calling at Antwerp, and the import was duty raised and there was a considerable fall in the market price of oranges due to an influx of other cargoes. Therefore, the plaintiff sought to recover these losses by way of damages for breach of the carriage contract, and the defendants sought to rely on the terms of the bill of lading which contained a liberty clause to call at any intermediate port. The court held that the oral

---

[8] [1879] 5 Q.B.D. 38.
[9] *Ibid.* at 40- 41.
[10] See *supra* fn. 5.

evidence was admissible to establish the original terms of the carriage contract. Lord Goddard C J., added,

> It is, I think, well settled that a bill of lading is not, in itself, the contract between the shipowner and the shipper of goods, though it has been said to be excellent evidence of its terms: *Sewell .v. Burdick*[11], per Lord Bramwell and *Crooks .v. Allan*[12]. The contract has come into existence before the bill of lading is signed; the latter is signed by one party only and handed by him to the shipper, usually after the goods have been put on board. No doubt if the shipper finds that it contains terms with which he is not content, or does not contain some terms for which he has stipulated, he might, if there were time, demand his goods back; but he is not, in my opinion, thereby prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the bill of lading or contained some additional term. He is not a party to the preparation of the bill of lading, nor does he sign it.[13]

However, the shipper is responsible for filling in the copy of the bill of lading, and so he will have the opportunity to check its terms. Also, it is not easy for the shipper to discharge the burden of proof, where he is challenging the accuracy of the terms of the bill of lading.[14]

But when the bill of lading is issued and indorsed for value to *a bona fide* third party, the terms of the carriage contract will be solely the terms of the bill of lading. The carrier, thus, cannot allege and prove that the terms of the carriage contract are different from those in the bill of lading. Thus, in *Leduc .v. Ward,*[15] the plaintiff sought to recover damages for a consignment which had been lost off the mouth of the Clyde. It argued that the unjustified deviation to Glasgow prevented the defendants from relying on perils of the sea exception in the bill of lading. In reply, the defendants argued that the shippers were aware at the time of shipment that the vessel was going to call at Glasgow. The Court of Appeal held that the plaintiff could recover damages on the ground that the deviation was

---

[11] [1884] A.C. 74 at 105.
[12] [1879] 5 Q.B.D. 38.
[13] See *supra* fn. 5 at 59- 60.
[14] See Wilson, J. F., *Carriage of Goods by Sea*, 4th Edition, Longman/ Pearson Education 2001, at p 135.
[15] See *supra* fn. 6.

not permitted by a term of the bill of lading contract, and that the terms of the carriage contract were solely those set out in the bill of lading.

1. 1. 2. CARRIAGE OF GOODS CONTRACT EMBODIED IN CHARTERPARTIES

Under normal practice, the bill of lading will be issued and signed by the master or any other agent of the shipowner. What is the precise status and the effect of the bill of lading where the carriage contract is embodied in a charterparty, specially when the charterer of the vessel, at the same time, is also the shipper of the goods? The relationship between the charterer, the shipowner and the cargo owner needs more explanation.

If the bill of lading is issued to a charterer who is the shipper of the goods, it operates only as a receipt and the relationship between the shipowner and the charterer is governed only by the terms of the charterparty, unless a term of charterparty provides that the terms of the charterparty may be modified or superseded by the terms of the bill of lading. Furthermore, the relationship between the charterer and the shipowner will be governed by the terms of the charterparty, even where the bill of lading has been indorsed to the charterer by the shipper of the goods. In *President of India .v. Metcalfe,*[16] the charterer was bound by an arbitration clause in the charterparty, despite the fact that the bill of lading which was indorsed to him by the shipper did not contain such clause. In the hands of the charterer the bill was a mere receipt and for this reason the Hague- Visby Rules will not apply to a bill of lading in the hands of the charterer. Article I (b) states that the Rules apply only where the bill of lading regulates the relationship between the carrier and the holder of the bill of lading. But the parties to a charterparty, by agreement between themselves, can incorporate the Hague- Visby Rules in their charterparty. Sometimes, the incorporation of the Hague- Visby Rules in the charterparty leads to conflict between the

---

[16] [1970] 1 Q.B.D. 289 at 290.

existing terms of the charterparty and the provisions of the Hague- Visby Rules. Thus, the courts have tried to resolve this problem by giving effect to the real intention of the parties to the contract. As the Rules will not have the 'force of law' in this situation, art. III (8) will not operate.[17] It is therefore possible for an express clause to prevail over a provision in the Rules. Thus, in *Metalfer Corporation .v. Pan Ocean Shipping Co. Ltd.*,[18] an express 30 days- time limit, arbitration clause, prevailed over the one-year time limit in art. III (6) of the incorporated Rules, paramount clause.

However, where the buyer is the charterer of the vessel, for the purpose of taking delivery of the goods, and the seller takes the bill of lading in his own name and for his own order, the relationship between the seller and the shipowner will be governed by the terms of the bill of lading. Where the bill of lading is indorsed to the buyer (charterer), the terms of the charterparty will govern the relationship between the buyer and the shipowner, by way of exception to the general principle.[19]

Where the goods have been shipped by a third party in a chartered vessel, there are two problems facing the shipper where the goods are lost or damaged in transit. First, the identity of the carrier, in particular whether the shipowner or the charterer is the carrier under the contract. Secondly, the precise terms of the contract of carriage.

1. 1. 2. 1 Who is the Carrier?

In respect to the identity of the carrier, the cargo owner will be confused where the bill of lading is issued under a charterparty. It is vitally important to know who the carrier is

---

[17] COGSA 1971, by virtue of s. 1 (6), provides that "Without prejudice to Article X (c) of the Rules, the Rules shall have the force of law in relation to-
(a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract, and
(b) any receipt which is a non- negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading, . . . ".

[18] [1998] 2 Lloyd's Rep. 632.

[19] Usually the relationship between the shipowner and the endorsee is governed by the terms of the bill of lading.

because the cargo owner must sue the carrier within the one-year limit under art. III (6) of the Hague- Visby Rules and under English law only one party is liable as a carrier under one carriage contract.[20] However, the bill of lading is often issued by the charterer, but is signed by or for the master. The question is whether the owner or the charterer is the party to the bill of lading contract. The shipowner will be regarded as the carrier, despite the existence of the charterparty contract, because he is still responsible for the management of the ship and the master signs any bill of lading as agent for him. This remains the position where the terms of the charterparty states that the master is authorised to sign the bill of lading on behalf of the charterer.[21] Under a demise charterparty the master will sign the bill of lading on behalf of the charterer not the shipowner. In *Baumwoll Manufactur von Carl Scheibler .v. Furness,*[22]where the ship was under a demise charter and the charterers appointed their own crew including the master. The House of Lords held that the bills of lading were not signed on behalf of the shipowner and the charterparty was by demise, despite the fact that, there was use of the word "demise" on the face of the bills of lading. If the charterer contracts with the shipper as principal and issues his own bill of lading, he will also be regarded as the carrier. The charterer may be treated as the carrier, if he signs the bill of lading without any indication that he is acting either as agent to the master, or the owner of the vessel. Everything will depend on the terms of the bill of lading and the construction of documents as a whole.

In general a bill of lading signed by the master would be considered as a shipowner's bill of lading on the basis of the *prima facie* rules that the master is the shipowner's servant or agent and so he has, if not actual, an apparent authority to bind the shipowner by his signature. It was concluded in *The Manchester Trust, Ltd .v. Furness,*

---

[20] See *The Antares*, See *supra* fn. 5 at 429, where it was held that art. III (6) is given the force of law by Carriage of Goods by Sea Act 1971 and it is applied to unauthorised carriage of goods on deck.
[21] *The Manchester Trust, Ltd .v. Furness, Withy & Co, Ltd.*, [1895] 2 Q.B. 539.
[22] [1893] A.C. 8.

Withy & Co. Ltd., that the a clause in the charterparty relating to the master signing bills of lading as an agent for the charterers would not be effective against the holder of the bill of lading. The effect of the reference to the charterparty, in the bill of lading, "is to incorporate so much of the charterparty as relates to the payment of freight and other conditions to be performed on the delivery of the cargo".[23] The position might have been different had the incorporating words in the bill been wide enough to incorporate that clause. Thus, *Carver* suggests that "if the bill of lading had been so drafted as to have incorporated the charterparty agency clause, either by express reference or by general words of sufficient width to bring about this result".[24]

A bill of lading signed by the charterer or his agent 'on behalf of the master or the owner' would also *prima facie* be a shipowner's bill of lading unless the signature indicates that it was intended to take effect as a charterer's bill. The Court of Appeal in *The Rewia*,[25] held that the bill of lading signed for the master could not be a charterer's bill of lading unless the carriage contract was made with the charterers alone and the person who signed the bill had authority to sign and did that on behalf of the charterers and not the owners. The authority of the signer, which was actual, was derived from clause 53 of the head charter which provided that "It is understood that the master will authorise Charterers, or their agents, to sign Bills of Lading on his behalf provided the Bills are made up in accordance with Mate's and Tally Clerk's receipts".[26] The Court of Appeal in *W. & R. Fletcher (New Zealand) Ltd. and Others .v. Sigurd Haavik Aksjeselskap and Others (The Vikfrost)*,[27] held that the charterer had an actual authority to sign the bills of lading on behalf of the master, by virtue of clause 13 of the head charter. Also, the charterer was

---

[23] [1895] 2 Q.B. 539 at 545.
[24] See Sir Guenter Treitel and Reynolds, F.M.B., *Carver on Bills of Lading*, London: Sweet & Maxwell, 2001, at para. 4- 032 and, also, see para. 4- 038.
[25] [1991] 2 Lloyd's Rep. 325 at 333.
[26] *Ibid.* at 329. The Court of Appeal distinguished *The Elder Dempster*, [1923] 1 K.B. 420, on the grounds that the charterers there not only used their own form of bill of lading but were shipowners in their own right and had chartered in additional tonnage.
[27] [1980] 1 Lloyd's Rep. 560.

expressly authorised to sub- let the vessel to a sub- charterer, by virtue of clause 19 of the head charter, without any restrictions as to the terms of the sub- letting, and so "by necessary implication the head charter authorised the charterer in case of such a sub-letting to put the sub- charterer in the same position as to signature of bills of lading as the charterer was under the head charter".[28] Accordingly, the Court of Appeal held that the sub- charterer had an implied authority to sign bills of lading and so to bind the shipowners.

However, Sheen J., held in *The Nea Tyhi*,[29] that a distinction must be made between the master issuing a bill of lading in respect of goods which have in fact not been shipped, as in *Grant .v. Norway*, and the master issuing a bill of lading which states that the goods are under deck when in truth they are on deck. In the former case the master has no authority to sign such bill, while in the latter case he has ostensible authority on the basis that the shipper would not be able to know that the statement is erroneous. By analogy, he held that the charterers' agents had an ostensible authority to sign the bills of lading on the master's behalf and so to bind the shipowners to the contract contained or evidenced by the bills. Sheen J., justified his view, as follows, "if I had to choose whether the shipowner or the endorsee of a bill of lading should be the loser, I would have no hesitation in saying that there is more reason that he who contracts with the charterer and puts trust and confidence in him to the extent of authorising the charterers' agent to issue and sign bill of lading should be a loser, than a stranger".[30]

As a matter of construction, the indications received from the manner in which the bill of lading is signed may be displaced by a clause identifying the carrier; the 'demise' or 'identity of carrier' clause. Brandon J., in *The Berkshire*[31] held that the demise clause

---

[28] *Ibid.* at 567.
[29] [1982] 1 Lloyd's Rep. 606.
[30] *Ibid.* at 611. For the opposite point of view see *Carver on Bills of Lading*, *supra* fn. 25 at para. 4- 033.
[31] [1974] 1 Lloyd's Rep. 185 at 188.

embodied into the bill of lading would have the effect of creating a contractual relationship between the shipowners and the shipper, made on behalf of the shipowners by the sub-agents of the charterers, as agents only.[32] Brandon J., gave effect to the demise clause, in accordance with its terms, on the ground that "The company or line by whom the bill of lading was issued, within the meaning of that clause, is clearly in this case Ocean Wide [the charterers' agent]. It is not in dispute that the ship was not owned or chartered by demise to that company, but was on the contrary owned by the shipowners. It follows that the bill of lading is, by its express terms, intended to take effect as a contract between the shippers and the shipowners made on behalf of the shipowners by Ocean Wide as agents only. The circumstance that Ayers signed the bill of lading as sub- agents for Ocean Wide does not affect the position, which is the same as if Ocean Wide had signed it themselves".[33] Therefore, Brandon's J., conclusion in *The Berkshire* provides clear authority for the recognition of the validity of such clauses under the English common law rules.

Such clauses may also operate to turn what appears to be a shipowner's bill into a charterer's bill. In *The "Venezuela"*[34] the sub- charterers issued bills of lading on their own standard form which were signed by their agents. The plaintiffs sued the sub- charterers for damages, but the latter alleged that the carriage contract was with the shipowners. The Court of Appeal had to decide the parties to the bill of lading contract upon the correct construction of the bill of lading. It held that the bill of lading which is presented and signed by the master will be a shipowner's bill of lading, but not all the bills of lading which are issued and signed on behalf of the master by the sub- charterers' agents will be

---

[32] However, Brandon J., in *The Berkshire*, *ibid.* at 188, held that the charterers had the authority to sign the bills of lading on the shipowners' behalf under cl. 8 of the charter- party. He also held that this authority which was based on cl. 8 of the charter- party was reinforced by the letter that was written by the master to the charterers' sub- agents.

[33] *Ibid.*

[34] [1980] 1 Lloyd's Rep. 393.

shipowner's bills of lading and the sub- charterers can issue a bill of lading on their own behalf.[35] As to whether the shipowner or the sub- charterer was liable as a carrier toward the shipper under the carriage contract, the Court of Appeal held that, according to an 'identity of the carrier' clause in the bill of lading, the carrier under the bill of lading was to be the sub- charterer and the terms of the bill of lading would be the same even where the goods were shipped by a ship owned by the sub- charterer. Thus, if the sub- charterer did not wish to contract as a carrier he should have clarified that the contracting party with the shipper is another company.

Clarke J., in *The Ines*[36] agreed with Brandon's J., conclusion in *The Berkshire* that in order to ascertain the true contracting parties to the carriage contract, it is necessary to examine the document itself and to consider the circumstances in which it came into existence. Accordingly, he held that the shipowners were the carriers under the carriage contract contained in or evidenced by the bills of lading, notwithstanding the existence of the following factors that pointed towards the bills of lading as time charterers' bills.[37] First, the words "Maras Linja" appeared in large capital letters on both sides of all bills of lading (Maras Linja were the time charterer). Secondly, the appearance of the following typed words "pp EIMSKIP- Rotterdam" underneath the signature box which contained the printed words "signed for the carrier Maras Linja" and underneath them the following further typed words "as agents only". Clarke J's., conclusion that the bill of lading was, nonetheless, a shipowner's document was based upon three factors. First, despite the ambiguity of the signature box, the charterers' agents, Eimskip, signed the bills of lading on behalf of the shipowners. Secondly, the charterers had an authority to sign the bills of lading on behalf of the shipowners, since clause 9 of the charter- party *inter alia* provided

---

[35] See *The Rewia*, *supra* fn. 25 at 333, where it was held that the bill of lading signed for the master could not be a charterer's bill of lading unless the carriage contract was made with the charterers alone and the person who signed the bill had authority to sign and did that on behalf of the charterers and not the owners.
[36] [1995] 2 Lloyd's Rep. 144 at 149.
[37] *Ibid.* at 150.

that "The charterers to indemnify the Owners against all consequences or liabilities arising from the Master, Officers or agents signing Bills of Lading or other documents or otherwise complying with such orders".[38] Finally, clause 19 of the charter- party, titled as "RESPONSIBILITY WHEN JOINT SERVICE", provided *inter alia* that "The contract evidence by this Bill of Lading is between the Shipper and the owner of the Ocean vessel named herein", and would have the same effect as a demise clause, despite the fact it was in different form and under a different title. This is because the meaning of joint service is no more than a service where the charterer is using a chartered vessel to provide its service.[39] It is arguable, however, that the findings of Clarke J., in *The Ines* can only be accepted on the ground of its unusual circumstance as to the ambiguity of the signature box which required the examination of other clauses of the bill of lading such as the carrier's identity and the demise clauses.[40]

Rix J., in *The Hector*[41] was not certain whether the question of whether a bill of lading is a charterer's bill or shipowner's bill should purely be answered according to the construction of the bill or whether the circumstances of case should also be taken into account. However, he adopted Clarke's J's., approach in *The Ines* of considering the construction of the document and then determining whether the circumstances of the case supported or detracted from that conclusion.[42] The source of the dispute in *The Hector* was the signature as 'For and on behalf of the master- as agents' and the USEL stipulation- 'CARRIER: U.S. EXPRESS LINES' on the face of the bill of lading. In addition, cl. 17 on the back of the bill of lading identified the shipowner as the carrier. As to the USEL stipulation Rix J., held that the term 'carrier' in the USEL stipulation- 'CARRIER: U.S.

---

[38] *Ibid.* at 149.
[39] *Ibid.* However, Clarke J., in *The Ines*, *supra* fn. 36 at 150, supported his conclusion by the surrounding circumstance of the issuance of the draft bill of lading in which the plaintiffs' agents and the charterers' agent initially intended the carriage contract to be between the shipowners and the plaintiffs.
[40] For similar finding see the decision of Hirst J., in *The Jalamohan*, [1988] 1 Lloyd's Rep. 443.
[41] [1998] 2 Lloyd's Rep. 287.
[42] *Ibid.* at 293- 294.

EXPRESS LINES' on the face of the bill of lading was critical, as it indicated that USEL [who were the time- charterer] was the party who undertook to carry out the obligations of the bill of lading contract. He then proceeded to hold that there was no conflict between the identity of carrier clause, cl. 17, and the USEL stipulation, as USEL was the only party which was expressly identified by name in the bill as the carrier, stating "For all that anyone reading the bill of lading knows USEL are owners, and there is no conflict between the stipulation that USEL are the carrier on the one hand and the signature for the master and cl. 17 on the other".[43] However, he held that in the case of conflict between the identity of carrier clause, cl. 17, and the USEL stipulation, the latter must be regarded as superseding the printed provisions of cl. 17. As to the signature 'For and on behalf of the master- as agents' Rix J., held that "The rule is only that in the ordinary way a bill signed by or for the master will be an owner's bill, not that it must be".[44] He agreed with the *dictum* of Sheen J., in *The Venezuela* [45]who held that if a sub- charterer did not wish to contract as a carrier he should have clarified that the contracting party with the shipper is another company, and he continued that "In this case, there is nothing on the face of the bill to say who the owners (and therefore the carrier) are, save for the clause stipulating that USEL are the carrier".[46] Finally, as to the circumstances of the case Rix J., supported his conclusion by the fact that the time charter did not authorise USEL to sign the bill of lading in conformity with the mate's receipt on behalf of the master, so as to bind the shipowners.

A variant on these facts occurred in *The Flecha* where the conflict was between the words of the attestation clause and the identity of carrier and demise clauses on the back of the standard form of bill of lading used by the charterer, CPC. Moore- Bick J., held that the

---

[43] *Ibid.* at 394.
[44] *Ibid.*
[45] See *supra* fn. 34 at 397.
[46] *Supra* fn. 41 at 395.

terms of the bills of lading; in particular the words of the attestation and both the identity of carrier clause and the demise clause, indicated that the shipowners undertook the responsibility for the carriage contract and so the bills were shipowners' bills rather than charterers' bills.[47] He also took the view that very clear wording was needed to make the charterers, not the shipowners, as the contracting party with the shipper. Describing the charterers 'loosely' as carriers in the signature box 'is not unusual or surprising'[48] and was not enough to demonstrate an intention to displace the effect of both the identity of carrier clause and the demise clause, even though the words raise the question as to the purpose of describing the charterers as carriers in the signature box.[49]

The courts' decisions in both *The Ines* and *The Flecha* appear to give conclusive effect to the printed terms such as the demise and the identity of carrier clauses, even though the typed words in the signature box pointed to a totally different outcome. However, recently, this issue was considered by the House of Lords in *The Starsin*[50] where the decisions in the above cases and in both *The Hector*[51] and *The Flecha*[52] were reviewed. The House of Lords has now overturned the decision of the Court of Appeal on this point and reinstated the initial finding of Colman J., that the bill was a charterer's bill.

Lord Bingham in *The Starsin*[53] justified his finding that the bill of lading was a charterer's bill on the ground that a shipper or transferee of a bill of lading cannot be expected to read detailed provisions on the back of the bill to find out whom he was contracting with, in particular, "when the bill of lading contains, on its face, an apparently clear and unambiguous statement of who the carrier is". He supported his view by the

---

[47] [1999] 1 Lloyd's Rep. 612 at 618.
[48] *Ibid.* at 619.
[49] *Ibid.* at 618.
[50] [2003] 2 W.L.R. 711, ([2003] UKHL 12). However, the decision of Colman J., of the first court, [2000] 1 Lloyd's Rep. 85, was reversed by the Court of Appeal, [2001] 1 Lloyd's Rep. 437, by Sir Morritt V-C and Lord Chadwick J (Lord Rix J dissenting).
[51] See *supra* fn. 41.
[52] See *supra* fn. 47.
[53] See *supra* fn. 50 at para. 15.

market practice of banks, as reflected in art. 23 (a) of the ICC Uniform Customs and Practice for Documentary Credit 1994, which does not require the examination of the small print on the back of the bill.[54] Lord Steyn agreed with Lord Bingham and added that a reasonable person, versed in the shipping trade, "would give greater weight to words specially chosen, such as the words which appear above the signature, rather than standard form printed conditions".[55] He reinforced his conclusion by art. 23 (a) of the ICC Uniform Customs and Practice for Documentary Credit 1994.[56]

Lord Hoffmann agreed with their Lordships that the bill was a charterer's bill and added that "if the carrier is plainly identified by the language on the front of the document, one never gets to the demise clause on the back. The language on the front simply takes priority and no attempt at reconciliation is required".[57] Lord Hobhouse agreed with this view, reasoning that "Where (the original) parties, by issuing and accepting these bills of lading with these signatures, have expressly agreed that Container Pacific Shipping (*sic*) [the charterer] shall be the contracting party, they have implicitly agreed that inconsistent clauses will be overridden".[58] Finally, Lord Millett held that it was not appropriate to attempt to reconcile the irreconcilable. Charterers simply used the wrong form and the provisions on the back which are inconsistent with the use of the form as charterers' bills are modified accordingly or treated as not applicable.[59] He, also, held that in the case of inconsistency between standard printed terms and those which the parties have agreed themselves written into the document, the latter prevail and, then, added that "This principle is applicable even where the inconsistent provisions are of equal importance and the printed form is appropriate to the particular case as well as to the general. How much

---

[54] *Ibid.* at para. 16.
[55] *Ibid.* at para. 45.
[56] *Ibid.* at para. 47.
[57] *Ibid.* at para. 85.
[58] *Ibid.* at para. 128.
[59] *Ibid.* at para. 182.

more must primacy be given to the written words where they describe the main intent and object of the particular contract".[60] The market practice was also a relevant consideration in finding that the bill was a charterer's bill of lading rather than a shipowner's bill.[61]

The decision of the House of Lords in *The Starsin* have now dissolved the uncertainty concerning the carrier's identity caused by the decision of the Court of Appeal in *The Starsin* and by the decision of Moore- Bick J., in *The Flecha*. As a result, the cargo owner's need to make a claim against both the shipowner and the charterer in order to avoid any uncertainty of the carrier's identity, in particular he has only one year time limit to sue the carrier responsible for the loss of or the damage to his cargo, is now reduced, if not demolished. This is because priority is now given to the front of the bill of lading rather than to the back. Moreover, the decision could be justified on the ground that the typed attestation clause should prevail over the identity of the carrier clause and the demise clause. Given the reasoning of the majority of their Lordships, the result would probably have been the same had the attestation clause also be printed. However, the identity of the carrier clause and the demise clause are probably to be relevant only in cases, such as *The Hector*, where both clauses appear on the front of the bill of lading. Such conflict would be determined by giving primacy to the typed material on the front of the bill of lading. However, if both the demise clause and the attestation clause were printed or typed it is unclear how the courts would determine the conflict.

Sir Guenter Treitel,[62] has suggested that this problem might be solved if more than one person answers the description of "the carrier" as to refer to either to contractual carrier or the actual carrier. Such an analysis is at odds with the general assumption that English law allows only one of the charterer or shipowner, but not both, to be considered

---

[60] *Ibid*. at pars. 183- 184.
[61] *Ibid*. at para. 188.
[62] In *Benjamin's Sale of Goods*, Guest, A. G., (*et al*) 6th Edition., London: Sweet & Maxwell 2002, at para. 18- 103.

as 'the carrier' under art. I (a) of the Hague or the Hague- Visby Rules. However, after *The Starsin* it seems that this assumption may need to be rethought some what.[63] Lord Steyn in *The Starsin*[64] rejected the argument of the cargo owners that the words like "The Carrier", "For the Carrier", and "As Carrier" can be treated as adding the personal liability of the charterers rather than excluding the liability of the shipowners on the ground that "the completed signature box, as well as the definition clause, points to a single carrier". Lord Hoffmann, also, rejected the argument, submitted by Mr Milligan, that the charterers may have contracted for themselves and for the shipowners as undisclosed principals on the ground that "but I do not think that any reasonable merchant or banker who might be assumed to be the notional reader of this bill of lading would imagine that there was more than one carrier or that the carrier was anyone other than CPS [the charterers]".[65] These comments indicate that it might be possible to have joint carriers under a bill of lading, providing the document was appropriately worded. In addition, the charterers would also have authority to issue a document that made the shipowners joint carriers.

1. 1. 2. 2. The Precise Terms of the Carriage Contract

As regards a third party, the bill of lading terms will be the terms of the carriage contract. The holder of the bill of lading will not be affected by any conflict between the terms of the charterparty and the terms of bill of lading, even if the shipper is aware of the existence of the charterparty. As we have noted above, the shipowner will be the first target of the holder of the bill. Therefore, the shipowner may insist on incorporating some or all of the provisions of the charterparty in the bill of lading. Under English Law, the inclusion of the terms of the charterparty in the bill of lading will be effective since the shipper has a

---

[63] Nevertheless, this line of argument might succeed under the Hamburg Rules on the ground that the actual carrier may be considered as a carrier under arts. 1 (2), 10 and 11. As a result, the problem of the carrier's identity would not arguably exist under the Hamburg Rules since the liability of both the carrier and the actual carrier is governed by the provisions of the Rules under arts. 7, 10 and 11.
[64] See *supra* fn. 50 at para. 49.
[65] *Ibid.* at pars. 84 and 85.

reasonable opportunity to notice the incorporation before or at the time he enters into the contract of carriage. But the courts still apply a strict interpretation to such an incorporation clause, since the shipper is unlikely to have seen the terms of the charterparty. Thus, in *Paros Shipping Corpn .v. Nafta (GB) Ltd.*,[66] it was held that the bill of lading neither incorporated the charter- party, nor gave the ship the protection of the terms of the charter- party because the references to a charter- party were left blank and the words of incorporation were of the narrowest kind.[67] In contrast, in *Denny, Mott and Dickson Ltd .v. Lynn Shipping Co Ltd*,[68] it was held that an arbitration clause in a charterparty had been effectively incorporated into the bill of lading, but that the clause did not apply in the events, which happened. The court held, regarding the under deck cargo, that the shipowners were protected by art. III (6) of The Hague Rules. In respect to the on deck cargo the shipowners were unprotected by the arbitration clause according to their natural and ordinary meaning, because cl. 32 applied in the case of final discharge. Therefore, where there is no final discharge, for any reason, "then the provisions as to the appointment of an arbitrator within 12 months, and the consequential words 'otherwise the claim shall be deemed waived and absolutely barred' do not apply".

Where the bill of lading is indorsed to a third party by a charterer, the terms of the carriage contract will be those contained in the bill of lading. Before the endorsement, the bill of lading operates as a receipt in the hands of the charterer. Under the Bill of Lading Act 1855, the rights which were being transferred to the endorsee or consignee were contained in the bill of lading. The bill of lading before endorsement in the hands of the

---

[66] [1987] 2 Lloyd's Rep. 269. The shipowners sought to rely on the terms of the charter- party including the arbitration clause. However, the references to the charter- party were left blank into the bill of lading and only the words of incorporation were "unto order or to his assigns on payment of freight and all other conditions as per charter- party.

[67] *Ibid.* at 271. The court, however, regarding to the owners' appeal held, according to III (v) of the Hague Rules, that "Therefore in the context of this case it is, and has to be, accepted that the charterers guaranteed to the shipowners that the tonnage 27,521,746 tonnes was accurate and that the charterers are under obligation to indemnify the shipowners against all loss, damages and expenses arising or resulting from (on the present assumption) the inaccuracy in the figure."

[68] [1963] 1 Lloyd's Rep. 339.

charterer only operated as a receipt, and thus, the charterer had no contractual rights under bill of lading and there were no rights to be transferred. Also, under the Carriage of Goods Act 1992, the holder of the bill of lading vests "all rights of suit under the contract of carriage as if he had been a party to that contract". Therefore, the rights which will be transferred to the holder of the bill might be thought to be the charterer's in the charterparty not in the bill of lading. In *Hain S.S Co .v. Tate & Lyle*,[69] Lord Atkin suggested a means of resolving the conflict, as following

> The consignee has not assigned to him the obligations under the charterparty, nor, in fact, any obligation of the charterer under the bill of lading, for *ex hypothesi* there is none. A new contract appears to spring up between the ship and the consignee on the terms of the bill of lading.[70]

Sometimes the shipper, also, is the charterer of the vessel, and the relationship between the charterer and the shipowner is governed by the terms of the charterparty. The bill of lading in the above case, only operates as a receipt, unless the charterer has indorsed the bill to *a bona fide* third party for value. Subsequently, the endorsement of the bill of lading to third party converts the bill into the carriage contract exclusively on the terms of the bill of lading. Moreover, where the ship is chartered by the owner to a charterer, and then sub- chartered, by the charterer to the shipper,[71] the relationship between the shipowner and the shipper, to whom the bill of lading may be issued, will be governed by the terms of the bill of lading.[72]

1. 2. US LAW AS REGARDS CHARTERER'S AND SHIPOWNERS' BILLS OF LADING

The question relating to the carriage contract is whether the contract is with the charterer or the shipowner where the bill of lading is issued under a charter- party. This is because, the

---

[69] [1936] 41 Com. Cas. 350.
[70] *Ibid.* at 356.
[71] See *Heinrich Hanno & Co. BV .v. Fairlight Shipping Co. Ltd.*, [1985] 1 Lloyd's Rep. 231 at 235- 236.
[72] Since nor the shipper, nor the endorsee, nor the consignee will be party to the charter. Also, the shipowner will not be party to the sub- charter.

liability for damage or loss of the goods under COGSA 1936 can only be assessed against a person who is found to be the carrier under that Act. Under American law, the courts answer this question by the principle of agency and also, in some cases, by conferring the status of carrier on both charterer and shipowner who participate in the carriage contract. However, the type of charter is an important factor to decide who is the carrier for COGSA 1936. Therefore, a demise charterer will, normally, be considered as the carrier since he has complete possession, command and navigation of the vessel. In contrast, the time or voyage charterer will not be considered as the carrier since he has no possession and control of the vessel. However, a time or a voyage charterer might be considered as the carrier for the 1936 Act where the bill of lading was issued and signed for the charterer.[73] Generally a bill of lading which is issued under charter- party and signed by the charterer "for the master" will, normally, be considered as a shipowner's bill of lading.[74] This is because the carriage contract with the shipowner may be entered either directly or indirectly by the charterer signing the bill of lading for the master. The court has to examine the charterer's authority to sign the bill for the master and the master's authority to sign the bill on behalf of the shipowner and therefore, the charterer will be considered as the carrier where he has no authority to sign the bill of lading for the master on behalf of the shipowner.[75]

However, there is a new trend called the 'practical approach' which is useful where the agency approach provides no solution, as where the tangle of relationships between the parties is unclear and the bill of lading was issued without significant negotiations between

---

[73] See *Yeramex International .v. S.S. Tendo*, 595 F. 2d 943 at 947- 948 (4th Cir. 1979), where the charterer by the terms of the charter- party assumed complete responsibility for handling the cargo and the issuance of the bill of lading. See also, *Bunge Edible Oil Co. v. M/V's Torm Rask Fort Steele*, 949 F. 3d 786, [1992] AMC 2227 (5th Cir. 1992).

[74] See *Pacific Employers Ins. Co. v. M/V Gloria*, 767 F. 2d 229 (5th Cir. 1985).

[75] See *Associated Metals and Minerals Corp. v. S.S. Portoria*, 484 F. 2d 460(5th Cir. 1973). See also *Union Steel America Co. v. M/V Sanko Spruce*, 14 F. Supp. 2d 682 at 685, 1999 AMC (D.N.J. 1998), where the court refused to give effect to the identity of carrier clause, because the bill was signed by the time charterer as 'carrier' on its form and the charterer also collected the freight.

the shipper and either the shipowner or the charterer. The 'practical approach' provides that all the parties involved in the carriage of the goods are carriers for COGSA 1936 as in *Joo Seng Hong Kong Co., Ltd. v. S.S. Unibulkfir.*[76] Conflict between the approaches can be avoided by arguing that the agency approach will provide a solution to cases where the identity of the person who issued the bill of lading can be ascertained and so to be the carrier for the 1936 Act. In contrast, the 'practical approach' will make a non- party to the bill of lading as a carrier for the 1936 Act if he was involved in some way in the issuance of the bill of lading or the loading of the cargo and the shipper shows that his actions contributed to the loss of or damage to the cargo.[77] However, it is arguable that the 'practical approach' will not be accepted under English law, since only one party is generally thought to be liable as a carrier under one carriage contract.[78] Also, the party liable as a carrier would be able to claim damages from the other party on the terms of the charter- party.

However, COGSA 1936 is under review by what is called the Proposed Amendments to COGSA 1936.[79] The aim of the Proposed Bill is to update the American law concerning the carrier's liabilities in order to be into line with the modern regulation governing the carrier's liabilities and also to be brought into line with the law of other

---

[76] 483 F. Sup. 43 at 46 (S.D.N.Y. 1979). However, the court, in *Agroexport & B.U.O. Assurance International, Ltd. v. S.S. Gordanka Nikolova*, [1983] AMC 1219 (S.D.N.Y. 1983), disagreed to hold the charterer who had nothing to do with a defective hatch cover to be liable on the ground of the purpose of COGSA which prevents suing parties with no involvement in either the bill of lading or the conduct alleged to have caused the cargo loss. See also *Transatlantic Marine Claims Agency, Inc. v. M/V OOCL Inspiration*, 1998 AMC 1327 (2 Cir. 1998), where the court held that the shipowner as well as the time charterer were carriers, despite the inclusion of an identity of carrier clause naming the time charterer as the carrier. The court, however, did not explicitly rule against the validity of the identity of carrier clause but it merely denied its purported effect in the particular case. However, the Fifth Circuit in *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F. 3d 1349, 1995 AMC 2317 (5th Cir. 1995), has considered the demise clause as invalid under s. 1303 (8) of COGSA, as an attempt to avoid or lessen liability. See also *Nippon Fire & Marine Ins. Co. v. Spring Wave*, 2000 AMC 1717 at 1719 (E.D. La. 2000), where the court considered such a clause as 'unlawful' under s. 1303 (8).

[77] See Schoenbaum, T., *Admiralty and Maritime Law*, 2nd Edition, Hornbook Series- West Group, fn. 16 and the corresponding text at 648 in chap. 9.

[78] This argument is supported by *The Antares*, [1987] 1 Lloyd's Rep. 424. For more detail see *supra* fn. 21 and the corresponding text.

[79] The Proposed Amendment to COGSA 1936 [Hereafter The Proposed Bill], Staff Working Draft, September 24, 1999, 106th CONGRESS- 1st Session, the text is available on the net at http://tetley.law.mcgill.ca/cogsa99.htm.

shipping countries, which would lead to certainty and uniformity. However, the Proposed Bill is still waiting to be enacted by the Senate and House of Representative of the United States of America in Congress assembled. The Proposed Bill, by virtue of s. 3, defines the performing carrier as

> "a person (i) that performs, undertakes to perform, or procures to be performed any of a contracting carrier's responsibilities under a contract of carriage; but (ii) only to the extent that the person described in clause (i) acts, either directly or indirectly, at the request of, or under the supervision or control of, a contracting carrier, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage".

Also, the Proposed Bill, by virtue of s. 4, defines the ocean carrier as "a performing carrier that owns, operates, or charters a ship used in the carriage of goods by Sea". Accordingly, under the Proposed Bill, the cargo owner would not have the problem relating to the identity of the carrier, since he would be able to sue the shipowner under the charterer's bill of lading as the performing carrier and to arrest the vessel to secure this claim.

1. 3. SHIPOWNERS' AND CHARTERERS' BILLS OF LADING UNDER THE HAMBURG RULES

The provisions of the Hamburg Rules provide a comprehensive solution to the dilemma of the cargo owner as to the identity of the carrier who would be sued for the loss of or the damage to the goods. Article 1 (1) of the Hamburg Rules defines the carrier as "any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper". Also art. 1 (2) of the Hamburg Rules defines the actual carrier as "any person to whom the performance of the carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted". The combined effect of art. 1 (1 & 2) of the Hamburg Rules is that the shipper

and the cargo owner would be entitled to proceed against both the charterer and the shipowner under the charterer's bill of lading. This is because the shipowner under the charterer's bill will be considered as the actual carrier and so the cargo owner's need to identify the carrier, as the contracting carrier, is a less pressing matter. Under art. 10 (1) of the Hamburg Rules, the contracting carrier remains responsible for the entire carriage according to the provisions of the Rules, even though the performance of the carriage or part thereof has been entrusted to an actual carrier. Moreover, by virtue of art. 10 (2) of the Rules, the actual carrier's responsibility is governed by all the provisions governing the carrier's responsibility and so the shipper or the cargo owner will not be better off suing the actual carrier in tort. These provisions would reduce, if not obliterate, the need for the doctrine of bailment and sub- bailment on terms as means of suing a shipowner when a charterer's bill has been issued or where goods have been transhipped under a cesser of liability clause.

However, by virtue of art. 11 (1), the rules contain a departure from the rules that the contracting carrier is responsible for the whole carriage performed by the actual carrier, and so the contractual carrier can avoid the responsibility for the part of carriage performed by the actual carrier where the requirements of art. 11 (1) are satisfied. The contractual carrier will have the benefit of this departure if the carriage contract provides "explicitly that a specific part of the carriage covered by the said contract is to be performed by a named person other than the carrier". The tranship clause and the cesser of liability clause, by virtue of art. 11 (1) of the Rules, are accepted as long as "judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of Article 21" and also, "the burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier". Therefore, the effect of these

provisions is that the cargo claimant would always be entitled to proceed against one of the two carriers according to the provisions of the Hamburg Rules.

1. 4. SHIPOWNERS' AND CHARTERERS' BILLS OF LADING UNDER THE DRAFT INSTRUMENT[80]

Ideally, the provisions of the Draft Instrument should provide a comprehensive solution to the dilemma of the cargo owner as to the identity of the carrier who should be sued for the loss of or damage to the goods. On the contrary, the Draft Instrument provides contradictory provisions dealing with this issue. The Draft Instrument, by virtue of art. 1 (1),[81] defines the carrier as "a person that enters into a contract of carriage with a shipper". Accordingly, shipowners as well as charterers can be qualified as carriers, for the purpose of the Rules, as long as they are the contractual parties. Also, the Draft Instrument, by virtue of art. 1 (5), defines the carriage contract as "a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another". The combined effect of art. 1 (1 & 5) is that in order to qualify a person as a carrier that person should agree contractually with the shipper to carry the goods from one place to another against the payment of freight. By virtue of art. 8 (2) (1) (e), the contract particulars in the document or electronic record must include "the name and

---

[80] There is a recent report of UNCITRAL's working group on the Draft Instrument, dated 6 Sept. 2002, which covers the chapters from 1- 9. 3. Report of the Working Group on Transport Law on the work of its ninth session (New York, 25- 26 April 2002), United Nations Commission on International Trade Law, Thirty- fifth session U.N. Doc. A/cn. 9/510, (Hereinafter U.N. Doc. A/cn.9/510). The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

[81] The current draft of the Draft Instrument refers to 'chapters' rather than 'articles', UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc. A/CN.9/WG.III/WP.21, (15- 26 April 2002), (Hereinafter U.N. Doc. A/CN.9/WG.III/WP.21). The full text of the document is available on the net; http://www.uncitral.org/en-index.htm. However, the terminology used in this work would be similar to that of the comments on text of the Draft Instrument UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc. A/CN.9/WG.III/WP.21/Add.1, (15- 26 April 2002), (Hereinafter U.N. Doc. A/CN.9/WG.III/WP.21/Add.1). The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

address of the carrier". Accordingly, the identity of the carrier should not cause any problem under the Draft Instrument.

However, the shipping practice is not as straightforward as it seems, in particular, where the bill of lading is issued and signed under a charter- party. Therefore, art. 8 (4) (2), provides that

> "If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named vessel, then the registered owner of the vessel is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage which transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer. [If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier]".

The first sentence of art. 8 (4) (2) establishes the presumption which enables the cargo owner to identify the carrier and so to commence a claim in the correct jurisdiction and within the short period of time for suit under art. 14 (1) of the Draft Instrument. This presumption has an important effect, in particular, where the vessel is under a charter-party and the charterer signs the transport document or the electronic record, without specifying the name and the address of the carrier, and adds words which make the identity of the carrier altogether vague.

However, this presumption can be defeated by the registered owner of the vessel who should prove that the vessel was under a bareboat charter, demise charter- party, at the time of the carriage which transferred the contractual responsibility for the carriage of the goods to an identified bareboat charterer. However, it is arguable that the effect of art. 8 (4) (2) is to do no more than to prove the validity and the effectiveness of both the identity of carrier clause and the demise clause, which are not in question under English law. Moreover, it is arguable that the identity of the carrier should not be an issue under the Draft Instrument. This is because the shipowners under charterers' bills of lading would be

considered as the performing parties of the carriage contract and so the cargo owners' need to identify the carrier is a less pressing matter.

Article 1 (17), defines the 'performing carrier' as

> "a person other than the carrier that physically performs [or fails to perform in whole or in part] any of the carrier's responsibilities under a contract of carriage, handling, custody, or storage of the goods, to the extent that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term "performing party" does not include any person who is retained by a shipper or consignee, is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee".

Therefore, the liability of both the carrier and the performing party is governed by the provisions of the Draft Instrument. The Draft Instrument would have been clearer had it adopted the wording used in art. 1 (1 & 2), art. 7, art. 10 and art. 11 of the Hamburg Rules, which define and regulate the responsibilities and rights of the carrier and actual carrier. Article 1 (2) of the Hamburg Rules, unlike art. 1 (17) of the Draft Instrument, provides no distinction between sub- contractors who actually perform and those who undertake to procure performance of any of the sub- contracted obligations. This means under a shipowner's bill of lading a time charterer will not be a performing party, but under a time charterer's bill of lading, the shipowner will be a performing party. The narrow definition of the 'performing party' under the Draft Instrument prevents the shipowner from incurring liability when it demise charters its vessel. However, if the negotiable transport document fails to contain the name and the address of the carrier as required under art. 8 (4) (2), there is only a presumption that the registered shipowner is the carrier. This can be rebutted in which case the claimant might still have difficulty in tracking down the right person to sue within the one-year time limit. Moreover, the so- called parties outside the definition of the 'performing party' in art. 1 (17) of the Draft Instrument are entitled to the benefits of the

defences and limitations of liability available to the carrier, without bearing any responsibilities under art. 6 (3) (3).

1. 5. TYPES OF BILLS OF LADING

Neither the Bills of lading Act 1855, nor the Carriage of Goods by Sea Act 1992 defined the term 'bill of lading', although, art. 1 of the Hamburg Rules defines a 'bill of lading' as

> ..... a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

It is important to analyse the different kinds of bill of lading, because of the very vital role the bill of lading plays in the carriage of goods by sea as well as in sale contract. After examining the basic types of bill of lading, I shall then consider the function of the bill of lading as a document of title. This function will give the clearest indication of what constitutes a bill of lading at common law.

1. 5. 1. 'SHIPPED' AND 'RECEIVED FOR SHIPMENT' BILLS OF LADING

Under a shipped bill of lading the carrier confirms that the goods are loaded on board of the vessel in the condition stated in the bill. In a received bill of lading the carrier just confirms that the goods are delivered to him and they are in his custody. In *Ishag .v. Allied Bank*,[82] in respect of the argument which was put forward on behalf of Mr. Fuhs, that the "January bill of lading is not even a received for shipment bill as ordinarily understood". Lloyd J., held that

> I would not take so narrow a view of the January bill of lading. It is true that it does not use the traditional language ''received for shipment''. But the language which it does use comes to the same thing. Nobody suggests that the goods have to be received by the shipowners themselves. It is enough that they received by their agents. For myself, I can see no practical or commercial difference between goods being received by agents on behalf of

[82] [1981] 1 Lloyd's Rep. 92.

> the shipowners and held in their own warehouse and goods being held at the disposal of the agents in the warehouse of another.[83]

Thus, Lloyd J., held that the January bill of lading was precisely the same as any other received for shipment bill of lading in respect of its legal effect.

Where the payment of the price is arranged under a documentary credit, the bank may refuse to accept a 'received for shipment' bill of lading as part of the shipping documents, unless the parties have agreed to the contrary in the sale contract, or there is a custom to that effect in a particular trade. In *Yelo .v. S.M. Machado & Co. Ltd.*,[84] the buyer instructed the bank, as a term in the letter of credit, to accept only a 'shipped' bill of lading. Sellers J. held that, the tender of a 'received for shipment' bill of lading was insufficient. Under art. III (3) of the Hague- Visby Rules, the shipowner is obliged to issue a bill of lading which provides that the goods have been received into his custody. But, where the goods were loaded on board the vessel, the carrier is obliged to issue a 'shipped' bill of lading on the demand of the shipper. Thus, the carrier can notate, at the port of shipment, that the goods are now on the board the vessel, and the document shall have the same functions as a 'shipped' bill of lading. By virtue of art. 23 (a) (ii) of UCP 500, banks will only accept shipped bills of lading, unless otherwise stipulated in the credit. Thus, a received for shipment bill can be accepted by specific stipulation into the credit. Also, art. 26 (a) (ii) which relates to multimodal transport document accepts this document which indicates that the goods have been dispatched, taken in charge or loaded on board. So, art. 26 can be used to support the acceptance of a received for shipment bill by banks under the UCP 500.

1. 5. 2. 'BEARER' AND 'ORDER' BILLS OF LADING

A bearer bill is a bill which does not provide the name of the person to whom the goods are to be delivered. Thus the goods will be delivered to the person who has the possession of

---

[83] *Ibid.* at 97.
[84] [1952] 1 Lloyd's Rep. 183.

the bill of lading. A bill of lading will be considered as an order bill where it provides that the goods to be delivered to the order of a named person.[85] The shipper is entitled to direct the carrier to deliver the goods to some one other than the named consignee.[86] In *The Lycaon*,[87] the seller diverted the goods from the buyer, who was the named consignee, by indorsing the bill by way of pledge to a bank. The court held that the seller was entitled to do that since the property in the goods had not been passed to the buyer.[88]

1. 5. 3. 'STRAIGHT' BILLS OF LADING AND SEA WAYBILLS

Sea waybills are important documents where the business is conducted on an open account basis. Therefore, s. 2 (1) (b) of the 1992 Act gives the named consignee under a sea waybill "all rights of suit under the contract of carriage as if he had been party to that contract". Section 1 (3) of the 1992 Act defines a sea waybill as a document that is not a bill of lading but as a receipt for the goods and as contains or evidences the carriage contract by sea. It, also, identifies the person to whom delivery of the goods is to be made by the carrier in accordance with the carriage contract. Accordingly, the named consignee under a sea waybill need not present the waybill in order to claim delivery of the goods from the carrier and, therefore, the carrier's obligation, under such document, is only to deliver the goods to the named consignee without being obliged to require presentation of that document. Against this background, a sea waybill is not a negotiable document and

---

[85] According to *The Roseline*, *supra* fn. 2 at 22, a bill of lading is an order bill where it makes the goods deliverable to a person's order in contrast to the straight bill of lading which makes the goods deliverable to a named person without further words of transferability. The bill of lading in *The Roseline* was an order bill because the goods were "consigned to Order" of the buyer's bank.

[86] But not after the shipper indorsed the bill of lading to the named consignee.

[87] [1983] 2 Lloyd's Rep. 548. The seller can not redirect the carrier to deliver the goods to another person than the named consignee where the property have passed to him "upon or by reason of such consignment" according to s. 1 of Bills of Lading Act 1855, because the rights of the seller have been transferred to the consignee, even where the bill or the goods have not yet been delivered to him. The position is the same under s. 2 (5) a of the Carriage of Goods by Sea Act 1992.

[88] It was held in *The Stettin*, [1889] 14 P.D. 142, that the carrier is obligated not to deliver the goods to an endorsee who failed to produce an original bill of lading. Therefore, the carrier is not entitled to deliver the goods to a named consignee in a bill of lading which has not been indorsed or to an endorsee of an indorsed bill without the production of the bill of lading.

any transfer or purported its endorsement will pass neither property nor possession in the goods covered by such document.

But what of a 'straight' bill of lading, a bill which lacks the wording necessary for transferability? Tuckey LJ., of the Court of Appeal in *Parsons Corporation & Others .v. C.V. Scheepvaartonderneming & Others (The Happy Ranger)*,[89] stated that "A 'straight' bill has no English law definitions, but the term derives, it appears, from earlier U.S. legislation referring to a 'straight' bill as one in which the goods are consigned to a specific person as opposed to an 'order' bill where the goods are consigned to the order of anyone named in the bill or bearer". Accordingly, it would seem that a straight bill of lading, like a sea waybill, is not a negotiable document and cannot be used to transfer the right to possession of the goods by endorsement and delivery. This view is supported by the decision in *The River Ngada*,[90] that the endorsee of a straight bill of lading obtained no title to sue under the Bills of Lading Act 1855 as no property passed to it by reason of the endorsement of the bill.

However, if transferability is not an essential element of a document of title, can straight bills of lading be regarded as documents of title? On the one hand, Carver suggests that "A 'straight' bill is not a document of title in the common sense, so that its transfer does not operate as a transfer of constructive possession of the goods. It is not a symbol of the goods because the carrier is not entitled and bound to deliver the goods without production of the bill. It follows that a carriage document will not be a document of title in the common sense if it is expressed on its face to be 'non- negotiable'. Sea waybills have the legal nature of 'straight' or 'non- negotiable' bills: they are similarly not documents of title in the common sense, since under such waybills delivery is to be made to the named consignee, irrespective of production of the waybill, and not to the holder of the waybill as

---

[89] [2002] 2 Lloyd's Rep. 357 at 363, ([2002] EWCA Civ. 694). For comment on this case see Martin- Clark, D., "Where are you leading us, *Ranger*", [2002] Shipping & T.L. 1.
[90] [2001] Lloyd's Maritime Law Newsletter.

such".[91] On the other hand, the authors of Schmitthoff disagree and state that "Even a bill of lading which is not made negotiable operates as a document of title, because the consignee named therein can only claim delivery of the goods from the shipowner if able to produce the bill of lading".[92]

As regards the status of the straight bill of lading under the Hague- Visby Rules, Tuckey LJ., of the Court of Appeal in *Parsons Corporation & Others .v. C.V. Scheepvaartonderneming & Others (The Happy Ranger)*,[93] held that it was unnecessary to decide the question whether straight bills of lading are documents of title on the ground that the document in issue was considered as a bill of lading. However, Tuckey LJ., noted that "it would be unwise to assume that the statements in the text books are correct", without pointing out which statements in which books he had in mind. Nonetheless, the Court of Appeal in *(The Happy Ranger)*, found no reason why a straight bill of lading should not fall within the provisions of the Hague- Visby Rules that apply to "bills of lading or other similar documents of title".[94]

The Court of Appeal in *The "Rafaela S"*,[95] has very recently held that a straight bill of lading does fall within the meaning of the Hague Rules, notwithstanding that it is not a non- negotiable document.[96] The Court of Appeal justified their conclusion in part by reference to the practice that the consignee must produce the bill to obtain delivery,[97] so aligning themselves with the decision in *Voss Peer .v. APL Co., Pte Ltd.*,[98] rather than the

---

[91] See *Carver on Bills of Lading*, *supra* fn. 24 at para. 6- 007. See, also, Sir Guenter Treitel in *Benjamin's Sale of* Goods, 6th Edition., *supra* fn. 62 at para. 18- 017, expresses the view that "under a straight bill (of lading) the carrier is entitled and bound to deliver the goods to the original named consignee without production of the bill (of lading)".

[92] D' Arcy, L., Murray, C., Cleave, B., and Others, (*et* al), *Schmitthoff's Export Trade: Law and Practice of International Trade*, 10th Edition, London: Sweet & Maxwell 2000, at para. 15- 038.

[93] See *supra* fn. 90 at 363.

[94] For support for the view see Martin- Clark, D., "Straight, but not Straightforward" [2003] 3 Shipping & T.L. 1 at 2.

[95] [2003] 2 Lloyd's Rep. 113 at 142, ([2003] EWCA Civ. 556).

[96] For the reasons which are given by Rix LJ., see *ibid* at pars. 134- 141.

[97] *Ibid*. at pars. 144- 145.

[98] [2002] 3 SLR 176.

courts of other jurisdictions. The High Court of Singapore in *Voss Peer .v. APL Co., Pte Ltd.*,[99] held, under Singapore law, that the carrier, under a straight bill, is only entitled to deliver the goods to a person, whether named as consignee or not, upon the production of such bill, unlike a sea waybill. The Malaysian High Court in *The Taveechai Marine*,[100] has, also, accepted the principle that it is a breach of contract for a shipowner to deliver cargo without the production of the bill of lading, even when delivery is made to the consignee. However, one could argue that the carrier under a straight bill of lading as well as a sea waybill undertakes to deliver the goods to the named consignee and, therefore, it seems that the production of such documents for delivery is unnecessary, unless the shipper instructed the carrier otherwise. This practice would only serve to delay commercial transactions as well as one of the purposes of the law which must be to promote commercial efficacy rather than hinder it.[101]

US law does not require a straight bill of lading to be presented for delivery of the cargo. Therefore, the carrier's obligation is to deliver the goods to the named consignee without being obliged to require presentation of such bill. The Hong Kong High Court in *The "Brij"*[102] held that "the essence of straight bills was that they were not negotiable and the contractual mandate was to deliver to named consignee without the production of the original documents".

Notwithstanding these points the Court of Appeal in *The "Rafaela S"*,[103] held that because the consignee must produce a straight bill of lading to obtain delivery of the cargo, such a document amounts to a 'document of title' notwithstanding that only a single transfer, to the consignee, is possible thereunder. In the light of this analysis, the consignee

---

[99] *Ibid.*
[100] [1995] 1 MLJ 413.
[101] For the support for this view see Lai, M., "Delivery of Cargo without Production of the Original Bill of Lading" 9 [2003] 3 JIML 284 at 286.
[102] [2001] 1 Lloyd's Rep. 431 at 434.
[103] See *supra* fn. 95 at pars. 143, 144, 151, 152, 158 and 159.

would obtain possessory rights once it obtained the bill of lading. The practical importance of the decision is that the consignor will be able to sue the carrier for delivering to consignee without production of the straight bill. A straight bill therefore gives a greater control to the consignor over delivery of the goods than does a sea waybill where no document needs to be produced to obtain delivery. It has become critical that sea waybills are accurately distinguished from straight bills. The most important indicator is likely to be the way in which the document itself is described.

1. 5. 4. SWITCH BILLS OF LADING

Switch bills arise when the shipper persuades the carrier to issue a second set of bills of lading to replace the bills initially issued. The carrier is under no obligation to accede such a request and, indeed, should do so only if all the original bills are surrendered to it. If this is not done, it will have put into circulation two competing sets of documents of title in respect of the same cargo. If A is the lawful holder of an original bill, and B the lawful holder of a switch bill, the delivery of cargo to one of these parties will not extinguish the carrier's liability for mis- delivery at the suit of the other. The rule in *Glyn Mills Currie & Co. v. East and West India Dock Co.*,[104] applies only when multiple copies of the same set of bills of lading end up in the hands of different parties.

In *The Atlas*,[105] it was held, obiter, that the shipowner was not bound by the terms of the switch bills issued by the agents of the sub- sub- charterers. Although the voyage charter contained a clause which permitted the voyage charterer to demand switch bills, subject to an indemnity, there was no similar clause in the head time charter. The sub- sub- charterers would have had authority under the chain of charters to issue bills of lading binding the shipowner, but there could be no implied or ostensible authority to issue a second set of bills. However, there was no evidence on the facts to indicate the shipowner

---

[104] [1882] 7 App. Cas. 591.
[105] [1996] 1 Lloyd's Rep. 642 at 644.

had ratified the excess of authority merely by delivering the cargo against an indemnity, but without production of a bill of lading, naming the shippers under the switch bills.

Another problem relating to switch bills is the potential conflict between the receipt statements in the two sets of bills. In *The Atlas*,[106] the receipt statements were broadly similar in the two sets of bills, the court was not prepared to consider the switch bill as a carriage contract but as potential of what had been shipped. However, it was held on the facts that neither set of bills provided evidence of receipt. Under Singapore law, in *Samsung Corp. v. Devon Industries*[107] the buyer with possession of the original bill persuaded the carrier to issue switch bills which were used by the buyer to sell the goods in disregard of the seller's rights. It appeared that the carrier did not act fraudulently in respect of the seller since the seller appeared to have transferred the original bills lawfully, but without securing the payment. Also, in *Socteh Sdn Bhn v. Temuka Navigation Co. Pte Ltd.*, [108] it appeared that the carrier was liable for non- delivery to the endorsees of the first set of bills of lading where a switch set had been obtained fraudulently from the carrier's agent.

1. 6. BILLS OF LADING AS DOCUMENTS OF TITLE

As will become clear in the next chapter, the statutory transfer of contractual rights to third parties will principally depend upon the existence of a bill of lading. To decide whether or not a document which appears to be a bill of lading is in fact a bill of lading one first needs to examine the defining characteristic of the bill of lading, its function as a document of title.

---

[106] *Ibid.*
[107] [1996] 1 S.L.R. 469.
[108] (Unreported 1995), cited in Sing, T.K., "Of Straight and Switch Bills of Lading" [1996] L.M.C.L.Q. 416 at 419.

In *Sanders .v. Maclean & Co,*[109] Bowen L J. summarised the role of the bill of lading as document of title as following

> A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading, by the law merchant, is universally recognised as its symbol and the endorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo. Property in the goods passes by such endorsement and delivery of the bill of lading whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods . . . it is the key which, in the hands of the rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.[110]

The bill of lading as a document of title enables the holder to demand delivery of the goods covered by the bill at the port of destination since it contains a promise by the carrier with the physical possession of the goods to deliver them only to the holder of the bill of lading and no- one else. Therefore, possession of the bill of lading will enable the holder to have constructive possession of the goods. The constructive possession of the goods will be transferred to any one merely by transferring the bill without any attornment. Thus, it can be said, the bill of lading is the only document that can, at common law, transfer constructive possession without attornment by the carrier.[111] The possession of the bill of lading is equivalent to the possession of the goods, and the transfer of the bill of lading has the same effect as delivery of the goods. Therefore, transferring the bill of lading transfers the right to demand delivery of the goods at their destination. In *Clemens Horst Co .v. Biddell Bros,*[112] the goods were to be shipped from San Francisco to London and the buyer refused to pay the purchase price until the goods were delivered. The Court of Appeal held that possession of bill of lading was in law equivalent to possession of the goods.

---

[109] [1883] 11 Q.B.D. 327.
[110] *Ibid.* at 341.
[111] Assuming the parties have intention to transfer the constructive possession and the goods are ascertained. Therefore, where the goods are unascertained, the holder of the bill will have no constructive possession.
[112] [1912] A.C. 18.

Therefore, the seller was entitled to the purchase price on shipping the goods, and tendering to the buyer the documents of title.

The bill of lading, as a document of title, in international sales enables the cargo owner either to raise credit in order to finance his transaction, or to re- sell the whole or part of the consignment in transit. The bill of lading, in order to operate as a document of title, must contain an undertaking by the carrier to carry the goods to their destination either to a named consignee, or to his order or assigns. Thus, a sea waybill will not be a document of title, in the common law sense, and its transfer does not operate as a transfer of constructive possession of the goods. Therefore, the holder of a sea waybill cannot raise credit or re- sell the goods in transit, because the carrier is bound to deliver the goods to the named person and not to the holder of the sea waybill. Thus, the carriage document will not be a document of title where it is expressed on its face to be a non- negotiable document.

1. 6. 1. WHETHER "RECEIVED FOR SHIPMENT" BILLS OF LADING ARE DOCUMENTS OF TITLE[113]

By issuing a document of title, the carrier with physical possession of the goods acknowledges that he is holding the goods on behalf of the holder of that document. Therefore, a document of title represents an obligation, which is a promise, by the carrier, to deliver the goods only to the holder of that document. Possession of a document of title provides the holder with sufficient control over the goods[114] and so, the holder will have constructive possession of the goods. The acknowledgement of the carrier, which is the essence of the document of title, would be transferred each time with the transfer of the

---

[113] In general see Procter, C., *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document*, Pretoria- Interlegal 1997, chapter. 3.

[114] Control over the goods would provide the holder, who is in possession of the document, with a right to sue the carrier in tort of conversion when the goods are delivered to some one else other than the holder on the ground of the carrier's break of his obligation embodied in that document of title.

document of title without any need for fresh acknowledgement and so constructive possession would also be passed to the new transferee. However, the Court of Appeal, in *Official Assignee Madras .v. Mercantile Bank of India Ltd*,[115] held that "The one exception was the case of bills of lading, the transfer of which by the law merchant operated as transfer of the possession, as well as the property in, the goods". Accordingly, the bill of lading is the only document at common law by which constructive possession can be transferred without attornment.

Nonetheless, constructive possession will not pass to the new transferee with the transfer of a document of title, unless there is an intention on the part of the transferor and the transferee. This is also supported by the decision of the Court of Appeal in *The Future Express*[116] where it was held that the bank could not sue the carrier in tort of conversion for mis- delivery because of the absence of an intention on the part of the parties to transfer constructive possession with the bills of lading, since both the seller and the bank knew that the goods had been delivered at the time of delivery of the bills. Furthermore, delivery of the document of title to the new transferee is important for the passing of constructive possession and so, being a named consignee is not enough for the transfer of constructive possession.[117] In order for constructive possession to pass with the transfer of the document of title, the goods, too, which are the subject matter of the transfer should also be identifiable. Constructive possession will not pass to the new transferee until ascertainment of the contract goods, despite the fact that the buyer will obtain property in common with other buyers of the bulk where they have paid for the goods and the bulk has been identified according to s. 20 A of the Sale of Goods (Amendment) 1995.

A document of title should also be a transferable one which means that the carrier's promise to deliver the goods to the holder of that document can be transferred without the

---

[115] [1935] A.C. 53 at 59.
[116] [1993] 2 Lloyd's Rep 542 at 547.
[117] See *Kum .v. Wah Tat Bank* [1971] 1 Lloyd's Rep 439.

need of a notice to the carrier. Delivery of the goods is affected by the transfer of possession and so transfer of the document of title with constructive possession represents a constructive delivery of the goods so as to satisfy the requirement of s. 27 of the Sale of Goods Act 1979. In order to satisfy the requirement of transferability, the document of title should contain words indicating that the named consignee can substitute an alternative deliveree.[118] For this reason a straight bill of lading might not be regarded as a document of title. Although the consignee must produce the bill to obtain delivery, such a document lacks the essential element of transferability. However, after the decision of the Court of Appeal in *The "Rafaela S"*,[119] it is clear that such a bill of lading does constitute a document of title. The document is capable of only a single transfer, to the consignee. But it is still transferable and it is clear that multiple transferability is no longer the essence of a document of title.

The only bill of lading which had been recognised as a document of title at common law in *Lickbarrow .v. Mason*[120] is the shipped bill of lading on the ground of the custom of merchants

> by the custom of merchants, bills of lading, expressing goods or merchandises to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons, by such shipper or shippers indorsing such bills of lading with his, her, or their name or names and delivering or transmitting the same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such indorsement and delivery, or transmission, the property in such goods hath been, and is transferred and passed to such other person or persons.[121]

---

[118] Palmer, N., & McKendrick, E., (*et al*) *Interests in Goods*, 2nd Edition, London and Hong Kong: L.L.P. 1998, Chapter 22 at pp. 548- 557.
[119] See *supra* fn. 95 at pars. 143, 144, 151, 152, 158 and 159.
[120] [1794] 101 ER. 380.
[121] *Ibid.* at 382.

There are several requirements in order to qualify a document as a bill of lading within the custom recognised in *Lickbarrow*. First, it should be issued by the carrier who accepts responsibilities for the goods throughout the entire voyage. Second, it should be a shipped bill and the goods must be on board of vessel. Finally, it should be transferable.[122] The status of a "received for shipment" bill of lading also bears an question of whether a combined transport bill of lading is a true bill of lading(i.e. a document of title) and, whether it is covered by the 1992 Act. There is no crystal-clear answer to the question of whether a "received for shipment" is a document of title at common law. Surely, a "received for shipment" bill is not a document of title according to *Lickbarrow .v. Mason* which only refers to "goods or merchandises to have been shipped by any person or persons to be delivered to order or assigns"?[123]

Judicial opinion is divided regarding to the status of a "received for shipment" bill of lading as whether it is a true bill and so a document of title. The Privy Council in *The Marlborough Hill*[124] held that a "received for shipment" bill is a document of title, despite the fact that the actual question before the Privy Council was whether a "received for shipment" bill was a bill of lading within s. 6 of the Admiralty Court Act 1861. Lord Phillimore refused to differentiate in principle between a 'shipped on board' bill of lading and a 'received for shipment' bill of lading on the ground that "The two forms of a bill of lading may well stand, as their lordships understand that they stand, together".[125] Therefore, he concluded that the only difference between the two forms of a bill of lading is ".... the practical business- like way of treating parcels of cargo to be placed on a general ship...".[126] The 'practical business- like way' in the case of a 'received for shipment' bill is "treating parcels of cargo to be placed on a general ship which will be

---

[122] See Palmer, N., & McKendrick, E., *supra* fn. 118 at p. 559.
[123] See *supra* fn. 120 at 382.
[124] [1921] 1 A.C. 444.
[125] *Ibid.* at 451.
[126] *Ibid.*

lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage".[127] As regard the objection to carry either by the named ship or by some other vessel, he concluded that "The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading; and if the contract begin when the goods are received on the wharf, substitution of the vessel does not differ in principle from transhipment".[128] Finally, he concluded that if a 'received for shipment' bill is a bill of lading, then, it is a negotiable bill of lading. This is because both parties agreed to call such bill a bill of lading and both by its terms have entered into obligations and acquired rights such as are proper to bill of lading.[129]

However, there was no reference in *The Marlborough Hill* either to the issue of a "received for shipment" bill as a document of title at common law, or whether it was a bill of lading under the Bills of Lading Act 1855. The decision of the Privy Council in *The Marlborough Hill* was criticised in *Diamond Alkali Export Corp .v. Fl. Bourgeois*[130] where a bill of lading provided that "Received in apparent good order and condition from D. A. Horan to be transported by the *s.s. Anglia*, ..., or, failing shipment by said steamer, in and upon a following steamer, 280 bags dense soda". It was held that a "received for shipment" bill was not a document of title according to the custom which was recognised

---

[127] *Ibid.*
[128] *Ibid.* at 452.
[129] There is a suggestion that the received for shipment bill in *The Marlborough Hill* was a document of title on the ground that it was issued in New York where received for shipment bills are regarded as documents of title by the custom. Also, the conclusion of the Privy Council was made regardless to the custom in *Lickbarrow .v. Mason* which is restricted to only a shipped bill of lading. See Debattista, C., *Sale of Goods Carried by Sea*, London: Butterworths 1990, at pp. 219- 228 and Guest, A. G., *supra* fn. 62 at para. 18- 060.
[130] [1921] 3 K.B. 443.

in *Lickbarrow .v. Mason*. However, the actual point which was decided in *Diamond Alkali* was that a "received for shipment" was not a good tender under c.i.f. contract.[131]

In *Ishag .v. Allied Bank*,[132] it was argued that the bill of lading which was issued was "not received for shipment" because of its words "We herewith confirm that the a.m. consignment is at the disposal of Messrs. Karl Geuther & Co. , Bremen, as Agents of the Joint Service (NEPH) and that same is intended to be shipped in 1 Lot with MS 'LYCAON' from Bremen to Douala" and so was not a document of title Lloyd J., held that

> It is true that it does not use the traditional language ''received for shipment''. But, the language which it does use comes to the same thing.[133]

Lloyd J., added

> Nor is there any difference, as was suggested, between ''for shipment'' in a received for shipment bill and ''intended to be shipped with'' in the present document. The document acknowledges that the goods are at the carriers' disposal. It provides for terms on which the goods are to be carried to their destination, namely Douala, and there delivered to the consignee or his assigns. It states the name of the ship by which it is intended that the carriage should be performed. In my Judgment the legal effect of the bill of lading is precisely the same as in any other received for shipment bill of lading.[134]

It was held in *Ishag .v. Allied Bank International*[135] that the January bill of lading which was exchanged by the sub- agents of the ship with warehouse receipts relating to the goods by the seller's forwarding agents was a document of title. The court held that the received for shipment was a document of title according to *The Marlborough Hill* without any reference to the criticisms of that decision in *Diamond Alkali Export Corp. v. Fl Bourgeois* [136] where the court held that the received for shipment bill was invalid for a c.i.f.

---

[131] It was suggested that the only objection against tendering a "received for shipment" bill under c.i.f. contract is the lack of the characteristics of a document of title. See Guest, A. G., *supra* fn. 62.
[132] See *supra* fn. 82.
[133] *Ibid.* at 97.
[134] *Ibid.* at 97- 98.
[135] *Ibid.*
[136] See *supra* fn. 130. The question of whether a "received for shipment" bill of lading is a document of title was not, basically, one of the issues which has been discussed in *The Marlborough Hill.*

contract which provides for a specific date of shipment and the Bills of Lading Act 1855 made reference only to shipped bills of lading. Therefore, *Diamond Alkali Export Corp .v Fl Bourgeois* applies only to cases where the buyer asked for a shipped bill of lading and the shipment should be within specific period such as under c.i.f. or f.o.b. with additional services. However, it was suggested that the January bill of lading was closer to the traditional bill of lading than the documents which were considered in *The Marlborough Hill* and *Diamond Alkali,* as it named the ship, which was the *Lycaon,* and did not give the carrier the right to carry the goods on a substitute ship.[137] It is arguable that the only objection against the January bill of lading being considered as a "received for shipment" bill of lading, and even as a document of title, is that the goods were at warehouses. Therefore, physical possession of the goods was not with the carrier but with the warehouseman, despite the fact that the warehouse receipts relating to the goods were with the carrier which would provide the carrier only with constructive possession of the goods and not with physical possession, so preventing the transferee of such a bill from acquiring constructive possession of the goods.[138] However, a "received for shipment" bill of lading is covered by s. 1 (2) (b) of COGSA 1992, although COGSA 1992 does not deal with the question whether a "received for shipment" is a document of title.[139]

A bill of lading is still a document of title until the carriage contract is discharged by delivery of the goods to the person entitled to them under terms of the bill of lading at their destination. The bill of lading is still a document of title, even if the goods have been

---

[137] See Guest, A. G., *supra* fn. 62.

[138] However, a similar objection might be raised in respect of a shipped bill of lading issued by a time charterer, but it is clear that such a document is as much a bill of lading as one issued by a shipowner.

[139] It has been submitted that a "received for shipment" bill of lading is not a document of title and so, it falls outside the custom recognised in *Lickbarrow .v. Mason.* See the English and Scottish Law Commissions Report, *Rights of Suit in Respect of Carriage of Goods By Sea,* [1991] 196 Eng. LCR and 130 Scot. LCR at para. 5. 4.

lost or mis-delivered.[140] It was held in *The Future Express*,[141] that delivery of the goods to the person entitled to them, without surrender of the bill to the carrier, will not terminate the validity of the bill of lading as a document of title.[142]

Most bills of lading are transferred either by way of security or pursuant to a contract of sale. In the case of transfer for security, the endorsee acquires the special property of a pledgee. It was held in *The Future Express*[143] that the bank never became a pledgee or acquired any security over the goods because when the bills of lading were negotiated to the bank, both the bank and the transferor, were aware that the goods had already been delivered to the buyer without the production of the bill of lading. Thus, the transfer of the bill of lading to the bank was not intended to transfer constructive possession of the goods. The bill of lading which is transferred pursuant to a contract of sale will transfer the general property in the goods to the consignee at some time. But the time at which the property passes to the consignee depends upon the intention of the parties according to the terms of the contract. The bill of lading is a negotiable document, but the transferee does not get better title to the goods than the transferor. Thus, where the negotiable bill of lading is obtained by fraud and then indorsed to a *bona fide* endorsee for value, the endorsee will not obtain title to the goods represented by that bill of lading. In *Kum and Another .v. Wah Tat Bank Ltd.*,[144] Lord Devlin concluded that

> It is well settled that ''Negotiable'', when used in relation to a bill of lading, means simply transferable. A negotiable bill of lading is not negotiable in the strict sense; it cannot, as can be done by the negotiation of a bill of exchange, give to the transferee a better title than the transferor has got, but it can by endorsement and delivery give as good a title.[145]

---

[140] See *East West Corporation .v. Dkbs 1912*, [2003] 1 Lloyd's Rep. 239 at para. 19, ([2003] EWCA Civ. 83), where the Court of Appeal held that a bill of lading is not a 'spent' bill when delivery is made to a party who is not entitled to possession of the goods.
[141] At the first instance, [1992] 2 Lloyd's Rep. 79.
[142] It was held in *Barclays Bank Ltd .v. Commissioners of Customs and Excise*, [1963] 1 Lloyd's Rep. 81, that the bill of lading does not lose its character as a document of title because it is not immediately presented on arrival of the ship at the port of destination.
[143] See *supra* fn. 116 at 547.
[144] See *supra* fn. 117.
[145] *Ibid.* at 446.

However, the *bona fide* endorsee may acquire a title even where his indorser has no title to the goods, according to s.10 of the Factors 1889 Act and s. 47 (2) of the Sale of Goods Act 1979, and will not be affected by the shipper's contractual rights such as stoppage in transit. Also, under ss. 8 & 9 of the Factors Act 1889 and under ss. 24 & 25 of the Sale of Goods Act 1979, the transferee of the bill of lading may get better title to the goods than his transferor. In *Cahn & Mayer .v. Pockett's Bristol Channel Steam Packet Co. Ltd,*[146] copper was sold upon c.i.f. terms and resold by the buyer to a sub- buyer. The copper was shipped and the bill of lading was indorsed in blank to the buyer with an invoice. The buyer failed to pay the purchase price and so the property never passed to him according to s. 19 (3) of the Sale of Goods Act 1979. The buyer sent the bill of lading to his buyer who paid in good faith. It was held that, the sub- buyer obtained a good title to the goods under s. 25 of the Sale of Goods Act 1979 and s. 9 of the Factors Act 1889, even though the buyer was not yet in the possession of the bill of lading at the time of sale to the sub- buyer. Also, the seller lost his right of stoppage in transit, under s. 10 of the Factors Act 1889 and under s. 47 (2) of the Sale of Goods Act 1979, because the bill of lading had been lawfully transferred to the buyer, even though he had not performed the condition on which the transfer was made.

Lord Devlin in *Kum and Another .v. Wah Tat Bank Ltd.*,[147] also noted that it has never been settled whether delivery of a bill of lading which is notated as a non- negotiable document transfers title or possession at all.[148] However, mate's receipts, exceptionally, may be treated as a document of title according to local custom. But, mate's receipts will

---

[146] [1899] 1 Q.B. 643.
[147] See *supra* fn. 117.
[148] But see *The River Ngada*, *supra* fn. 90, where a purported endorsement of such a document was held not to transfer property in the goods covered by the straight bill. As such a document lacks the characteristic of transferability, it cannot be regarded as a true bill of lading. Therefore, attornment will be needed if possession is to transfer to the third party holder of such a document. The decision is unaffected by the decision of the Court of Appeal in *The "Rafaela S"* as it did not involve the consignee named in a straight bill but a purported endorsee.

not be treated as a document of title where they are notated as non- negotiable documents. Thus, the mate's receipt was considered to be a document of title as a result of the local custom which was found to exist in the trade between Singapore and Sarawak. But, the custom did not apply to the actual mate's receipt in question, because it was marked as 'not negotiable'.

It has been noted above that, a "received for shipment" bill of lading is not a document of title according to *Lickbarrow .v. Mason* and so was outside the scope of the Bills of Lading Act 1855, since a "received for shipment" bill of lading was not in use in 1794 or 1855.[149] It has also been suggested that a "received for shipment" bill of lading is not a transferable document of title, since art. III (7) of the Hague- Visby Rules obliges the carrier to issue only a "shipped" bill of lading, if the shipper so demands.[150] The carrier's liability under the Hague- Visby Rules would be on a 'tackle to tackle' basis which allows the carrier to exclude liability for pre- shipment period.[151] Therefore, it is arguable that a "received for shipment" bill of lading under which the carrier assumes responsibility for the goods during the entire period of transportation including the pre- shipment period would provide the shipper with a level of control equivalent to that under a "shipped" bill of lading.[152] However, according to the modern practice goods are generally not delivered by the shipper to the ship's side, but instead they are delivered the carrier at inland depot and so bills of lading in respect of the goods are issued in received for shipment rather than shipped forms.[153] Moreover, a "received for shipment" bill of lading is accepted under art. 23 (a) (ii) of the Uniform Customs and Practice for Documentary Credits No. 500 and art.

---

[149] Carver, T. G, "On Some Defects in the Bills of Lading Act 1855" [1890] 6 L.Q.R. 289 and Sanson, N., "Carriage of Goods by Sea Act 1992- *The Practice and Legal Implications*, Conference Documentation, IBC Legal Studies and Services Limited Maritime Law Division 1993, SAS Portman Hotel, London W 1. 1 at pp. 4- 5.

[150] See Sanson, N., *ibid.* at p. 5.

[151] Under art. 4 of the Hamburg Rules, the carrier should accept responsibility for the goods from the moment that the goods are taken into his charge.

[152] In *The Marlborough Hill*, *supra* fn. 124 at 451- 452, Lord Phillimore affirmed that the carrier should assumes responsibility for the goods during the entire period of transportation.

[153] See Palmer, N., & McKendrick, E., *supra* fn. 118 at p. 562 and Debattista, C., *supra* fn. 129 at p. 212.

26 which provides for the tender of multimodal transport documents which indicate simply that the goods have been "dispatched", "taken in charge", or "loaded in board" since a multimodal transport document would normally be a "received for shipment" bill of lading.[154] In addition, it has been argued that the only difference between a "shipped" or a "received for shipment" bill of lading is that a "received for shipment" bill of lading states that the goods have been received for shipment and so the bailment of goods has started at an earlier stage than in the case of shipped bill of lading which is a distinction of fact, but not in law.[155] Therefore, the Law Commissions recommended that "implementing legislation should treat "received for shipment" bills of lading on the same footing as "shipped" bills of lading".[156] Also, it has been submitted that

> that there would now be little difficulty in establishing that all three types of documents [through bills of lading, combined transport bills of lading and bills of lading in a "received" form] are by custom treated as transferable documents of title. A "received for shipment" bill of lading is undoubtedly within the Carriage of Goods by Sea Act and there seems no reason to doubt that the other forms of bill of lading are also within the Act[157]

It is also arguable that, although art. III (7) of the Hague- Visby Rules imposes an obligation on the carrier to issue a shipped bill on the shipper's demand and the shipper is under a duty to surrender any document of title which has been taken by him to the carrier. Therefore a "received for shipment" bill of lading would seem to be a document of title, since it is one of the documents which the Hague- Visby Rules contemplate being issued by the carrier in respect of the goods.[158] Besides, a "received for shipment" bill of lading is accepted by mercantile practice as a traditional bill of lading, it is also transferred from one party to another by the necessary endorsement and delivery, in additional to the acceptance

---

[154] See Palmer, N., & McKendrick, E., *supra* fn. 118 at pp. 563, 567 and Sanson, N., *supra* fn. 149 at p. 6.
[155] See Debattista, C., *supra* fn. 129 at pp. 223- 224.
[156] See the Commissions Report *supra* fn. 138 at para. 2. 48.
[157] See Boyd, S. C., (*et al*) *Scrutton on Charterparties and Bills of Lading*, 20th Edition, London: Sweet & Maxwell 1996, at p. 375. Also, it has been submitted that, bankers and traders deal with "received for shipment" bills of lading and "shipped" bills of lading in the same way.
[158] See Faber, D., "The problems arising from multimodal transport", [1996] LMCLQ. 503 at 513.

of this document in return for a loan to finance the sale transaction by UCP No. 500. Therefore, this recognition of the received for shipment bill of lading would probably constitute a custom which would help the courts in recognising a "received for shipment" bill of lading as a document of title.[159]

1. 6. 2. THROUGH BILLS OF LADING[160]

This is a document where the carrier undertakes to be responsible for carrying the goods from the point of reception to the point of final destination. It is used where the contract of carriage will be performed by more than one carrier. Therefore, the first carrier will be responsible towards the cargo owner for the loss of or damage to the goods during the entire period of carriage. However, where the carriage mode is the same during the whole contract such as sea carriage the document which issued by the first carrier will be a through bill of lading. While the carriage of the goods involving more than one mode of carriage as sea and road carriage the document which issued by the carrier will be combined transport documents. There are three basic types of through bill of lading.

1. 6. 2. 1. Pure Through Bills of Lading

The first carrier undertakes to be responsible for the carriage of the goods from the point of receipt to the point of final destination against payment of the freight for the entire voyage. The bill must contain a clause to the effect that the principal carrier will be obliged to sub-contract on- carriage from the port of transhipment with another carrier in his own name and at his own expense.[161] Therefore, the cargo owner can sue the initial carrier for the loss of or damage to the goods regardless whether or not the loss or damage took place in the

---

[159] Lord Devlin in *Kum .v. Wah Tat Bank*, *supra* fn. 117 at 444, noted that "The function of the commercial law is to allow, so far as it can, commercial men to do business in the way in which they want to do it and not to require them to stick to forms that they may think to be outmoded". It is arguable therefore, that the recognition of this document is a necessity on the ground of its recognition by all the parties related to business, in particular, banks and businessmen. For support for this view see Palmer, N., & McKendrick, E., *supra* fn. 118 at 567 and Sanson, N., *supra* fn. 149 at 6.

[160] Through bills of lading will be discussed in more detail in chapter 2 under sub- title 2. 5. 1.

[161] A bill of lading which contains a clause to that effect is still a normal bill of lading.

initial carrier's hands. The on- carrier will usually issue his own bill of lading for the part of carriage which he actually performs, therefore, there will be two bills of lading covering the same goods in circulation. The consignee under the individual bill of lading may be the initial carrier or the rightful holder of the through bill of lading. But if the individual bill of lading falls in the hands of a third party acting in good faith, he can demand delivery from the on- carrier without being entitled under the through bill of lading.[162]

A through bill of lading will fulfil the function of the usual bill in respect of being receipt of the goods by the carrier as to the quantity and the condition. The question of whether or not the through bill of lading is a document of title has never been answered in the affirmative. But some authorities have concluded that there is nothing preventing it from being considered as a document of title because the initial carrier is responsible for the goods during the entire voyage even in the event of transhipment, especially where the through bill of lading is shipped bill.[163] Therefore, the through bill of lading does not suffer from the problem which concerns the "received for shipment" bill of lading and so should be accepted as normal bill of lading. Under the common law referring to the through bill of lading as a document of title means no more than it is transferable. Therefore, proof to the contrary is possible even against the third party acting in good faith. The on- carrier who issued the individual bill of lading cannot confer rights to the goods on the third party that he himself did not have. Therefore, the delivery of the goods should be against the through bill of lading, or else the individual bill of lading should contain a clause that delivery against the individual bill should be linked to the presentation of the through bill of lading. However, a third party acting in good faith can demand delivery against the individual bill of lading from the on- carrier without being the rightful holder under the through bill of

---

[162] See De Wit, R., *Multimodal Transport- Carrier Liability and Documentation*, London: Lloyd's of London Press Ltd- LLP 1995 at p. 295.

[163] See Todd, P., *Modern Bills of Lading*, 2nd Edition, London: Blackwell Law 1993, at p. 69. The Carriage of Goods by Sea Act 1992 applies to bill of lading and therefore a broad interpretation of its provisions would be enough to cover the through bill of lading.

lading. Therefore, the rightful holder of the through bill of lading can sue in contract the carrier who has issued it, because the undertaking as to the delivery by on carrier in the individual bill is given to the initial carrier.

Do the Hague or Hague- Visby Rules cover the period when the goods are on-shore during transhipment once the sea carriage in a ship has begun? The Supreme Court of British Columbia addressed this question in *Captain .v. Far Eastern Steamship Co.*,[164] where the cargo of household effects in vans was carried from Madras, India to Vancouver. The cargo was damaged as a result of fresh water because the vans were left out in the open in Singapore. The question before the court was whether the Hague Rules applied to the part of the contract during which the goods were on the dock at Singapore. It was held that that part of the contract which related to holding the goods on dock was not within the Rules since it did not relate to "the carriage of goods by water".[165] The same issue was considered in *Mayhew Foods .v. Overseas Containers Ltd.*,[166] where a cargo of frozen chicken was shipped from Shoreham to Le Havre for off loading and reshipment upon anther vessel to Saudi Arabia. Bingham, J., distinguished *Mayhew Foods* from *Captain* in two respects. The shipper in the latter case was told that there would be transhipment and there were two separate bills of lading for the two legs of the journey. Bingham, J., agreed that the Rules would not apply to carriage or storage before the port of shipment and after the port of discharge, since it would be inland carriage but not sea carriage. Bingham J., concluded that the Rules apply from the time of shipment until discharge at the port of destination, even if the goods were discharged and stored on land for transhipment, since such operations were "in relation to and in connection with the carriage of goods by sea" in a ship. Therefore, Bingham, J., held that the contract between those port was for carriage

---

[164] [1979] 1 Lloyd's Rep. 595.
[165] *Ibid.* at 601- 602.
[166] [1984] 1 Lloyd's Rep. 317. For more details see Rose, F., "Transhipment and the Hague- Visby Rules- *Mayhew Foods Ltd., v. Overseas Containers Ltd.*" [1984] LMCLQ 202.

by sea despite the language of cl. 21 and so "the [R]ules, having applied on shipment at Shoreham, remained continuously in force until discharge at Jeddah".[167] It is arguable that *Captain* is factually different from *Mayhew Foods* but such difference should not be the ground for applying a different result, therefore *Captain* should have been viewed by Bingham as having been wrongly decided, since both vessels were owned by the same carrier and under his management and also the carrier had assumed responsibility throughout the carriage contract. Moreover, Bingham J's argument could be used in the *Captain* case that the contract was for carriage by sea despite the transhipment and such transhipment was related to the carriage contract. Otherwise, the application of the Rules could be avoided by carrying the goods by an indirect way to the port of destination. This conclusion would be supported by the different treatment of cases where the carrier assumes responsibility for carriage of the goods only to the port of transhipment and therefore the period of transhipment would not be covered by the Rules since the on-carriage would have been done by a different carrier under a different bill of lading.

A variant of this problem came up in *The Anders Maersk.*[168] Two boilers were shipped from the USA pursuant to a through bill of lading which conferred a right on the carrier to tranship the cargo. The defendants shipped the boilers from Baltimore to Hong Kong and arranged for them to be transhipped from Hong Kong to Shanghai. The boilers were damaged and the plaintiffs claimed for the full loss suffered by them. The defendants relied upon the incorporation of the U.S. Carriage of Goods by Sea Act 1936 into the bill of lading and the package limitation therein. The plaintiffs contended that by reason of the transhipment in Hong Kong the final leg of the carriage was subject to the Hague- Visby Rules as enacted in Hong Kong. Mayo J., held that COGSA 1936 applied to the whole of the carriage in that there was no reference to Hong Kong in the bill of lading. In

---

[167] *Ibid.* at 320.
[168] [1986] 1 Lloyd's Rep. 483.

transhiping the defendants were simply exercising a right under that bill of lading. He then proceeded to hold that 'shipment' under the Hague- Visby Rules did not embrace transhipment and therefore, the defendants were entitled to limit their liabilities.

1. 6. 2. 2. Collective Through Bills of Lading

The initial carrier here undertakes to perform or in his name to procure performance of the carriage. Each carrier will be responsible, according to the terms of his bill of lading, for the goods whilst in his possession.[169] Thus, this kind of bill does not provide the same security to the consignee because the issuer of this bill can escape from the liability for the periods which falls outside the mandatory tackle to tackle period of liability in the Hague Visby Rules. The aim of the collective through bill of lading is that the issuer should protect his shipper or consignee by delivering the goods to a competent carrier and he should take a clean shipped or receipt from the on-carrier, on the ground that he has delivered the goods to on- carrier in the same apparent good condition as he received them and the on carrier should do the same towards the consignee.[170]

1. 6. 2. 3. False Through Bills of Lading

Under this type of bill of lading, the carrier only undertakes to forward the goods to their final destination. So the carrier will be responsible for the goods while they are in his possession and his responsibility ends at the moment of transhipment. According to *Cliffe .v. Hull and Netherlands S.S. Co.,*[171] this document is not considered as a through bill of

---

[169] Such clause is valid because it does not violate art. III (7) of the Hague- Visby Rules which apply from tackle to tackle. The tackle to tackle exemption clause from liability to be effective regarding to the loss or damage to the goods on land should be in the collective through bill of lading and it is not enough to be in each individual bill of lading, since the holder of the collective through bill will have no knowledge of the contents of the individual bills. See De Wit, R., *supra* fn. 162 at pp. 305- 307.

[170] Whether or not the collective through bill of lading is a document of title, the same conclusion, which applied to the pure through bill of lading, can be applied to this document and so the answer will be affirmative.

[171] [1921] 6 L.I.L.R. 136, where the shipowner issued a bill of lading for carriage of the goods from Rotterdam to Hull which included a clause "to be forwarded from Hull [. . .] to Manchester". It was held that the document was not a through bill of lading and the carrier just acted as a forwarding agent regarding to forward the good from Hull.

lading. It is a document of title only regarding the part of the voyage which is actually performed by the first carrier to the port of transhipment. This is because the false through bill is useless at the port of destination as a document giving a right to deliver the goods since it does not represent the goods at that time. Therefore, the consignee's right to take delivery of the goods derives from the individual bill which issued by the on- carrier. Unless The Hague- Visby Rules apply the on- carrier may prove that he did not receive the goods in apparent good order and condition as mentioned in the document.[172]

The question arises as to whether a liberty to tranship clause and a cesser of liability clause would offend art. III (8) of the Hague- Visby Rules. These standard clauses are commonly used in the liner trade bills of lading and initially it reflects the parties' freedom to determine the scope of their agreement. As regard a liberty to tranship clause, it was held, in *G. H. Renton .v. Palmyra Trading Corporation of Panama*,[173] that the idea of art. II of the Hague Rules is to give the parties the right to decide which particular functions should be performed by the carrier and so, the performance of any of the designated functions, by the carrier, should be governed by the Hague Rules. Therefore, the effect of art. III (2) of the Hague Rules is only to prevent the carrier from contracting out of liability where he undertakes the performance of one of those functions and not to specify those operations. Therefore, under the Hague Rules, the parties are free to allocate responsibilities for various tasks in the carriage contract as between themselves and so, it would not be void and null by virtue of art. III (8).[174] One could argue, accordingly, that a liberty to tranship clause and a cesser of liability clause are obligations clauses rather than exception clauses and so it will not be void or null under art. III (8) of the Hague- Visby Rules. If this line of argument is accepted, the cargo owner might end up without any

---

[172] See De Wit, R., *supra* fn. 162 at p. 307.
[173] [1957] A.C. 149 at 174. In coming to their decision their Lordships endorsed similar comments to this effect made by Devlin J., in *Pyrene .v. Overseas Containers Ltd.*, [1954] 2 Q.B. 402 at 418.
[174] *Ibid.* at 168- 173

contractual remedy against either the first carrier or the second carrier for the loss of or the damage to the goods after transhipment.[175] As a result, sub- bailment on terms might be a viable solution as to give a non- contractual rights to the cargo owner and to define such right within the Hague- Visby Rules. Attornment is vital if a third party cargo owner is to have a non- contractual right against the carrier by virtue of the sub- bailment doctrine, otherwise the cargo owner will have non- contractual rights of suit in negligence and conversion. If the goods are lost prior to delivery, as where the ship sinks, the successor in title will have no claim to proceed in bailment and will have to proceed in negligence.[176]

1. 6. 3. COMBINED TRANSPORT DOCUMENTS [177]

The issuer of the combined bill of lading undertakes for the carriage of the goods from the point of reception to the point of final destination. The goods under the combined bill of lading involves at least two modes of carriage such as sea and road. Sometimes the combined bill of lading will be issued by a person other than the carrier such as the freight forwarder.[178] It is unclear whether or not the combined bill of lading is a document of title. Carver argues that such document would not be a document of title if it is issued in a non-negotiable or a straight form, or issued by a freight forwarder agent who is not acting as carrier or multimodal transport operator.[179] He first argues that a bill of lading relates to sea carriage and that such document would not be a document of title, even though issued by a sea carrier, because "It would (.....) scarcely be satisfactory to make the legal nature of the document depend on the proportion which the sea carriage bore to the land carriage".[180] Secondly, he argues that such document would be issued in the form of received rather than shipped bill of lading. However, this problem can be overcome by making a notation

---

[175] For supporting this view see Baughen, S., "Article III rule 8. A Killer Provision?" 3 (3) STLI 14 [2002].
[176] The shipper, however, may still sue in bailment as in *The Pioneer Container*, [1994] 1 Lloyd's Rep. 593.
[177] Combined transport documents will be discussed in detail in chapter 2 under sub- title 2. 5. 3.
[178] Freight forwarder bills of lading will be discussed in more detail in chapter 2 under sub- title 2. 5. 2.
[179] *Carver on Bills of Lading*, *supra* fn. 24 at para. 8- 078.
[180] *Carver on Bills of Lading*, *supra* fn. 24 at para. 8- 079.

to the effect that the goods were put on board of vessel.[181] There is nothing essentially different in this document from a received for shipment bill of lading so if that is a document of title so, too, should the combined transport bill. Where the combined bill is issued by the freight forwarder it can be regarded as a straight bill of lading and so the rules of the Carriage of Goods by Sea Act 1992 concerning the waybill may still apply to it but the carrier may still have to deliver the goods upon the presentation of the combined bill of lading. However, the combined bill of lading can still be considered as a receipt for the goods by the carrier and as evidence of the carriage contract. As will be shown in the next chapter, the problem with combined transport documents is not so much their uncertain status as documents of title but whether or not COGSA 1992 applies to a contract where only part of the carriage is by sea. This difficulty also arises in relation of freight forwarder bill of lading which would be also discussed in the next chapter. Moreover, these documents would be considered under both the Hamburg Rules and the Draft Instrument.

1. 6. 4. SHIP'S DELIVERY ORDERS

A ship's delivery order as a document of title is relevant given provisions of COGSA 1992. It is relevant because of the issue of title to sue in tort, providing a ship's delivery order issued under a combined transport bill of lading which is held to fall outside COGSA 1992. Ship's delivery orders are used in bulk cargoes where the whole consignment is covered by a single bill of lading. They enable the seller to split out a bulk consignment into smaller parcels and to sell them to different buyers while the goods are still at sea. The meaning of the expression 'ship's delivery order' at common law, depends upon the context in which it is used. In *Colin & Shields .v. W. Weddel & Co. Ltd*[182], a sale contract provided that the payment would be on presentation of documents "full set of bills of lading, and/ or ship's delivery order (to be countersigned by banker, ship broker, captain, or mate, if so required

---

[181] *Carver on Bills of Lading, supra* fn. 24 at para. 8- 079.
[182] [1952] 2 All E.R. 337.

by the buyers), and a policy or certificate of insurance. If a bill of lading and/ or insurance policy were not supplied, the buyers were to be put in the same position as if they had been in possession of such documents".[183] A ship's delivery order was issued and signed by the shipowners which was addressed to the Master Porter and authorised him to deliver the goods to the named person, who was the buyer, in the order. The Court held that this ship's delivery order was not within the meaning of the term of the sale contract and the buyers were entitled to refuse payment against it. The buyers were looking for a ship's delivery order which would put them in the same position as the bill of lading. But, the ship's delivery order which was tendered was issued by the shipowner and addressed to a third party. Thus, the buyers would have no cause of action against the shipowners.[184]

However, the ship's delivery order which would satisfy the buyer would be a document issued by the shipowner which contained a promise by him to deliver the goods to the person named in the order or the holder of it.[185] According to *Waren Import Gesellschaft Krohn & Co .v. Internationale Graanhandel Thegra N.V,*[186] a ship's delivery order will be acceptable where it is issued by or on behalf of the shipowner and contains an express or implied undertaking to deliver the goods on board of the ship to the named person or the holder of it.[187] The same rules will apply to a ship's delivery order in the case of charterparty. Therefore, a ship's delivery order will not be a good tender where it is issued by the charterer or sub- charterer on behalf of the shipowner directing the

---

[183] *Ibid.*

[184] However, attorment will only give a possessory rights to the attornee, entitling him to claim the cargo and to sue in conversion for misdelivery.

[185] There is no difference between ship's delivery order issued by the shipowner and one which is addressed to him, unless the shipowner has attorned to the buyer. Roskill J., emphasised the same idea in *Margarine Union G.m.b.H .v. Cambay Prince S.S. Co. Ltd,* [1969] Q.B. 219 at 231, when he said : "They are delivery orders addressed by or on behalf of the sub charterers with whom alone the bill of lading holders, who were not the plaintiffs, were in contractual relationship, directing the ship to release the quantities of copra specified in the respective delivery orders to whomever might come along to the ship or to the ship's agents in Hamburg with the delivery orders in order to obtain possession of and, through obtaining possession, obtain legal title to those four parcels of 500 tons each.".

[186] [1975] 1 Lloyd's Rep. 146 at 155.

[187] It was also held in *Waren Import Gesllschaft Krohn & Co .v. Internationale Graanhandel Thegra N.V.,* [1975]1 Lloyd's Rep. 147 at 155, that there is no difference whether the ship's delivery order issued direct or re- issued by the shipowner as long as it is incorporating such an undertaking.

charterer's agent to deliver the goods to the order of the sellers. This is because, the undertaking embodied in that document would not be in favour of the buyers.[188]

Ship's Delivery Orders as Documents of Title?

As we have noted above a ship's delivery order is not, in the common law sense, a document of title, unless a custom to that effect is proved. This is because the transfer of the ship's delivery order, which is issued by the seller and addressed to the carrier to deliver the goods to the buyer, will not transfer constructive possession of the goods or amount to a delivery of the goods to the holder. But where the carrier attorns to the buyer and thereby acknowledges that he holds the goods on his behalf, it will transfer constructive possession. Also, the transfer of the ship's delivery order from one transferee to another will not transfer constructive possession without a new attornment by the person in possession of the goods, the carrier. Although s. 1 (4) of the Factors Act 1889, which applies to the Sale of Goods Act 1979, refers to the ship's delivery order as a document of title, according to s. 29 (4) of the Sale of Goods Act 1979 constructive possession of the goods in the hands of the third party, the carrier, will not be transferable without attornment. The words of s. 29 (4) strike a balance between the common law rule and the Factors Act 1889.[189] Under s. 1 (4) of the Carriage of Goods by Sea Act 1992, a ship's delivery order is considered as a document containing an undertaking "an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person". The undertaking should be "under or for the purpose of a contract of carriage by sea of the goods to which the document relates, or of goods which include those goods". Section 1 (4) of the Carriage of Goods by Sea Act 1992, provides the same requirement as the common law and moreover, a ship's delivery order can be issued in relation to bulk cargo. Therefore a ship's delivery order must contain an undertaking by

---

[188] *Waren Import Gesllschaft Krohn & Co .v. Internationale Graanhandel Thegra N.V.*, *supra* fn. 187 at 155.
[189] See Guest, A. G., *supra* fn. 62 at pars. 18- 168 and 169.

the carrier, and should be given to the person to whom delivery is to be made and any ship's delivery order which does not contain these requirement will fall outside the Act[190].

1. 6. 5. MATE'S RECEIPTS AS DOCUMENTS OF TITLE?

A mate's receipt is a document issued by the shipowner or on his behalf, to the shipper of the goods and it contains statements as to the quantity and condition of the goods. A mate's receipt, according to *A.R. Brown, McFarlane & Co .v. C. Shaw Lovell & Sons and Walter Potts*,[191] is not a carriage contract.[192] In *Naviera Mogor S.A .v. Soc. Metallurgique de Normandie (The Nogar Marin)*,[193] it was concluded that the mate's receipt is not a document under which the contractual rights under the carriage contract, with the carrier can be transferred to or created in favour of the third party. Nor is a mate's receipt a document of title according to the common law sense. It was held, in *Nippon Yusen Kaisha .v. Ramjiban Serowgee*[194] that

> Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is non conclusive, and its statements do not bind the shipowners as do the statements in a bill of lading signed within the master's authority.[195]

However, a mate's receipt can be a document of title where a custom to that effect can be proved. So in *Kum .v. Wah Tat Bank Ltd,* [196] there was found to be a custom in the trade between Sarawak and Singapore to that effect. The Carriage of Goods Act 1992 makes no reference to the mate's receipt and thus, the common law rules will apply, unless there is a local custom. However, the categorisation of a mate's receipt as a document of

---

[190] Where the ship's delivery order issued by someone other than the carrier, or is given to the seller, shipper, to deliver the goods to the buyer

[191] [1921] 7 LI.L.R. 36 at 37.

[192] In *The Hector*, *supra* fn. 41 at 299, the court held that the bill of lading was a charterer's bill of lading, Rix. J., submitted that where the sale contract provides for payment against other documents such as mate's receipt, the seller will not be bound to procure a bill of lading and so, a mate's receipt can be the carriage contract. But, it is arguable that the above *dictum* is limited to cases where the bill of lading is a charterer's bill and payment against other document apart of the bill of lading is rare. Therefore, the above *dictum* would be limited to cases which would not be supported by international trade practice.

[193] [1988]1 Lloyd's Rep. 412 at 420.

[194] [1938] A.C. 429.

[195] *Ibid.* at 445.

[196] See *supra* fn. 117.

title in the statutory sense depends upon the words of s. 1 (4) of the Factors 1889 Act "used in the ordinary course of business as proof of the ..... control of goods.". This question has never been raised in the English Courts and "the question whether mate's receipt used in the ordinary course of business seems to be one of fact".[197]

1. 7. CONCLUSION

The identification of the contractual carrier has attracted considerable litigation over recent years. This is because most of the bills of lading have been issued on the charterers' forms as well as they have been signed by or on behalf of the master who is traditionally the shipowners' agent. As a result, the cargo owner would face difficult choice in selecting the appropriate defendant which might be irretrievable where he has only one year time limit to sue the carrier responsible for the loss of or the damage to his cargo.

One could argue that the issue of the carrier's identity should be determined primarily by the words of the carrier's identity and the demise clauses, provided that the interpretation of the terms of the bill of lading as a whole, in particular the words of the signature box, did not clearly displace or supersede these clauses. However, the interpretation and the construction of the bill of lading as a whole, by the English courts, has led to conflicting results which provide unpredictable guidance for determining the carrier's identity under English law. Nonetheless, the aim and the purpose of both the carrier's identity and the demise clause might arguably provide a more satisfactory and acceptable result to the cargo owners' dilemma.

On the one hand, the aim and the purpose of the carrier's identity is to deal with a bill of lading which is signed by the charterer or its agent on behalf of the master. Therefore, the signatory of such bill is not acting as a principal and assumes no personal responsibility. On the other hand, the aim and the purpose of the demise clause is to deal

---

[197] See Guest, A. G., *supra* fn. 62 at para. 18- 139.

with a bill of lading which is issued by the charterer, who is neither the shipowner nor the demise charterer and the bill is signed by or on its behalf and so, its effect is to cover a case where the person by whom the bill of lading has been issued appears to be the shipowner but, in fact, it can be seen that he is not the shipowner and that person by whom the bill has been issued had the authority to issue the bill on the shipowner's behalf. This conclusion might arguably be right on the basis that the signature box provided nothing to contradict this assumption. However, the written words in the signature box should be capable of overriding the assumption in the demise clause. It seems, therefore, that if the bill of lading has been issued and signed by or on behalf of the liner company 'charterer' as an agent, the liner company 'charterer' by issuing and signing the bill of lading would have been acting solely as an agent on behalf of the shipowner and would have assumed no personal liability for the carriage contract. This is because the written words in the signature box provide nothing to contradict the assumption contained in the demise clause. In contrast, if the bill of lading has been issued and signed by or on behalf of the liner company 'charterer' as 'carrier', the liner company 'charterer' by issuing and signing the bill of lading would have been acting solely as a principal and would have assumed personal liability for the carriage contract.

The decision of the House of Lords in *The Starsin* have now dissolved the uncertainty concerning the carrier's identity caused by the decision of the Court of Appeal in *The Starsin*[198] and by the decision of Moore- Bick J., in *The Flecha*. As a result, the cargo owner's need to make a claim against both the shipowner and the charterer in order to avoid any uncertainty of the carrier's identity, in particular he has only one year time limit to sue the carrier responsible for the loss of or the damage to his cargo, is now reduced, if not demolished.

---

[198] For comments on the decision of the Court of Appeal in this respect see Wilson, J., "*The Starsin* Spot the Contractual Carrier" [2001] STLI Lawyer International, 4 at p. 7.

However, the Hamburg Rules and the Draft Instrument with their concepts of 'actual' and 'contracting' carrier and 'carrier' and 'performing party', respectively, make the issue of the carrier's identity less critical. This is because the liabilities of both the contracting carrier and the actual carrier or the performing party are governed by the same rules under these instruments. Therefore, the cargo owner's need of suing the actual carrier or the performing party in a tort action would be reduced, if not dispensed with altogether under both the Hamburg Rules and the Draft Instrument.

A further problem with existing English law is that if a liberty to tranship and a cesser of liability clauses are viewed as obligations clauses rather than exception clauses, and so will not be void or null under art. III (8) of the Hague- Visby Rules, the cargo owner might end up without any contractual remedy against either the first carrier or the second carrier for the loss of or the damage to the goods after transhipment. In this situation, sub- bailment on terms might be a viable solution as to give a non- contractual right to the cargo owner and to define such right within the Hague- Visby Rules. However, attornment is vital for a third party cargo owner to maintain an action in bailment against the second carrier. In the absence of attornment, the third party cargo owner will have to sue in negligence. This will oblige it to prove that at the time of the loss it either owned the goods or had the immediate right to the possession.

By virtue of art. 11 (1) of the Hamburg Rules, transhipment and cesser clauses are accepted as long as "judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of Article 21" and "the burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier". Therefore, the effect of these provisions is that the cargo claimant would always be entitled to proceed against one of the two carriers on the according to the provisions of

the Hamburg Rules.[199] The tranship clause and the cesser of liability clause are also accepted under the Draft Instrument, by virtue of art. 4 (3) (1) relating to mixed contracts of carriage and forwarding, provided that these clauses were the subject to discussion between the parties and that they were accepted by them.[200] The head carrier, acting as agent, under the Hamburg Rules, would not be able to escape liability, by virtue of art. 11 (1), if no judicial proceedings "can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of Article 21".

In contrast, the head carrier, acting as agent, under the Draft Instrument, by virtue of art. 4 (3), would be able to escape liability altogether if the parties make a special agreement for a cesser of liability clause and this will still be valid, even if it is not possible to sue the 'performing party'. This is because the head carrier would not qualify as a 'performing party' under art. 6 (3) (2) (a) (i) by virtue of the words of art. 1 (17), nor as 'other person, including a performing party's sub- contractors and agent' under art. 6 (3) (2) (a) (ii) by virtue of the words "who performs or undertakes to perform any of the carrier's responsibilities under the carriage contract" since what the second carrier performs or undertakes to perform is not part of the head carrier's responsibilities under the head carriage but rather under one of the second carrier's responsibilities under the its sub-carriage contract.

Finally, the status of certain types of bills of lading, particularly the 'received for shipment' and 'combined transport' bills remains uncertain. This is not in itself critical to the application of COGSA 1992 which has dispensed with the property linkage of the Bills of Lading Act 1855. However, COGSA 1992 does not define a 'bill of lading' and

---

[199] Article 11 (1) of the Hamburg Rules contains a departure from the rules that the contracting carrier is responsible for the whole carriage performed by the actual carrier, and so the contractual carrier can avoid the responsibility for the part of carriage performed by the actual carrier where the requirements of art. 11 (1) are satisfied. The contractual carrier will have the benefit of this departure if the carriage contract provides "explicitly that a specific part of the carriage covered by the said contract is to be performed by a named person other than the carrier".

[200] For more detail about art. 4 (3) (1) of the Draft Instrument see sub- title 5. 7 of chapter 5.

therefore identifying which documents constitute 'bills of lading' under the Act will require reference to the common law. Whether or not these uncertain documents can be classified as bills of lading will primarily depend upon an answer to the question of whether or not they amount to documents of title.

CHAPTER TWO: THE RIGHTS OF THE CARGO OWNER TO SUE THE CARRIER ACCORDING TO CARRIAGE OF GOODS BY SEA ACT 1992

2. 1. INTRODUCTION

The purpose of the enactment of the Bills of Lading Act 1855 was to resolve the problems imposed by the English legal doctrine of privity of contract. As the cases in the next section showed, the 1855 Act no longer adequately dealt with the problems created by modern trades and carriage practices, in particular, where goods were lost or damaged in transit. As a result of the problems associated with the Bills of Lading Act 1855, there was, "a threat that lucrative shipping and insurance business, litigation and arbitration might be lost to the City and the national economy".[1] Therefore, new legislation needed to be based upon a direct and sensible foundation in order to cure all the problems caused by the previous Act and to satisfy the commercial community.[2] Also, the new legislation should be brought into line with the law of other competitor countries, such as some other European states.

The Carriage of Goods by Sea Act 1992,[3] which replaced the Bills of Lading Act 1855, is based upon the recommendations of the English and Scottish Commissions as set out in their report.[4] COGSA 1992 broke the link between the acquisition of the contractual rights and the passing of property, extending the transferring of the contractual rights to

---

[1] Bradgate, R., & White, F., "The Carriage of Goods by Sea Act 1992", [1993] 56 MLR. 188. In general see Howard, T., "The Carriage of Goods by Sea Act 1992" 24 J.Mari.Law & Com. [1993] 18 and Reynolds, F.M.B., "The Carriage of Goods by Sea Act 1992" [1993] LMCLQ 436.

[2] As the Commission pointed out that "reconciling the interests of all parties to a contract of sea carriage, in accordance with the dictates of good sense and commercial certainty," The English and Scottish law Commissions, *Rights of Suit in Respect of Carriage of Goods by Sea,* (1991) 196 Eng LCR and 130 Scot LCR at para. 1.10.

[3] The Carriage of Goods by Sea Act 1992. [Hereafter COGSA 1992 or the 1992 Act].

[4] See *supra* fn. 2.

others carriage documents and resolved most of the problems created by the decision in *Grant .v. Norway.* [5]

The discussion in this chapter will be related to bills of lading, ship's delivery orders and sea waybills under COGSA 1992, and to whether other documents such as combined transport bills of lading are covered by COGSA 1992. The resolution introduced by COGSA 1992 to the problem created in *Grant .v. Norway* will also be considered in the context of title to sue.

2. 2. BILLS OF LADING ACT 1855

The purpose of the enactment of the Bills of Lading Act 1855 was to abolish the problems imposed by the doctrine of privity of contract. This doctrine had two limbs. First, a third party could not sue under or rely on the terms of a contract to which it was not a party. Secondly, a contracting party could generally recover only nominal damages where a breach of contract caused it no loss, but did cause loss to a third party. Nonetheless, the shipper as an original party to the carriage contract still can sue the carrier for breach of that contract for the benefit of the person who had suffered the loss according to *Dunlop .v. Lambert*, as an exception to the common law rules. However, the statutory assignment of contractual rights which was implemented by the Bills of Lading Act 1855 was not without problems. This was mainly because of the statutory link between the transfer of the contractual rights and the passing of property required by virtue of s. 1 of the 1855 Act. As a result, the consignee or the endorsee of a bill of lading could not sue or be sued where the property passed a long time before the bill of lading was indorsed, as seen in cases such as *The Delfini.*[6] The issue before the Court of Appeal in *The Delfini* was whether the property had passed to the plaintiffs on the endorsement of the bill of lading and so they had a cause of action against the defendants by virtue of s. 1 of the 1855 Act. The Court of Appeal held

[5] [1851] 138 E.R. 263.
[6] [1990] 1 Lloyd's Rep. 252.

that the property had passed to the plaintiffs a long time before the bill was indorsed to them and there was no real connection between the passing of property and the endorsement of the bill.[7] However, the Court of Appeal rejected the wide view which would cover the facts of *The Delfini* on the ground that it would "do violence to the words of the Act". But it is arguable that the narrow view "would do just as much 'violence to the words of the Act' as the wide view: it would deny all force to the words 'or by reason of' endorsement.[8]

The same result also followed where the property had been passed a long time after the bill of lading had been accomplished as to operate as a document of title in cases such as *The Aliakmon*.[9] Furthermore, s. 1 of the 1855 Act would not assist the buyer of a portion of a bulk cargo which had been sold and delivered against a bill of lading in cases such as *The Aramis*,[10] as a result of the combined effect of s. 1 of the 1855 Act and s. 16 of the Sale of Goods Act 1979. This is because the property would not pass until the goods had been ascertained which would only take place, after the consignment or endorsement of the bill of lading.[11]

The Bills of Lading Act 1855 failed to cover other shipping documents such as sea waybills and ship's delivery orders. The use of these documents had become widespread in international trade and the non- application of the 1855 Act undermined the use of these documents, in particular in situations where the buyer has no intention to sell or to deal

---

[7] The narrow view anticipated that the property in the goods has to pass at the same time as the consignment or the endorsement of the bill of lading. In contrast, the wide view anticipated that it is not necessary for the property in the goods to pass at the same time as the consignment or the endorsement of the bill of lading. Therefore it was held in *The Delfini*, *supra* fn. 6 at 272, that "although the endorsement of the bill of lading is not the immediate occasion of the passing of property, nevertheless it plays an essential causal part in it".

[8] See Treitel, G. H., "Passing of property under c.i.f. contracts and the Bills of Lading Act 1855- *The Delfini*" [1990] LMCLQ 1 at 3.

[9] [1986] 2 W.L.R. 902.

[10] [1989] 1 Lloyd's Rep. 213.

[11] The problem of the buyer of a portion of a bulk cargo problem is solved by s. 20 (A) of Sale of Goods (Amendment) Act 1995 where the property would pass on payment of the price. However, constructive possession would not pass unless and until the goods which are the subject matter of the transfer are ascertained, which would only take place after the goods are delivered. For more details about the Bills of Lading Act 1855 see Todd, P., "Oil Cargoes and the Bills of Lading Act" [1990] 7 OGLTR 214 and Urbach, A., "The Bill of Lading: Who Owns the Cargo You Just Have Bought?" [1983/ 84] 12 OGLTR 267.

with the goods during transit, or where the seller desired to sell part of his goods to different buyers during transit. Therefore, it became clear that the non- application of the 1855 Act to these documents was prejudicing the use of English law as the law of the contract which in turn would have also affected London as one of the most important cities for litigation and arbitration. This failure would have been magnified by doubts as to the non- application of the 1855 Act to a "received for shipment" bill of lading, despite the modern usage of delivering the goods to inland depot for carrying them by sea rather than delivering the goods alongside the ship which is not suitable to modern trade any more. Furthermore, the inability of banks to sue the carrier by virtue of s. 1 of the 1855 Act, since they could only assert a special property rather than a full property,[12] undermined the use of the bill of lading as a security document in financial transactions.

The courts, on the one hand, tried to resolve the problem of the statutory link by introducing a wide interpretation of s. 1 of the 1855 Act as in *The Elafi*.[13] But, the wide interpretation was not accepted by the courts in cases such as *The Delfini*, on the ground that though property need not have passed at the time of consignment or endorsement, it still should not pass a long time after the consignment or endorsement in order for the requirements of s. 1 to be satisfied. On the other hand, the courts tried to resolve the ineffectiveness of s. 1 of the 1855 Act and the problems caused by the doctrine of privity of contract by the implementation of the general principles of the common law such as implied contract[14] or liability in tort which are dealt with in chapter five.

---

[12] See *Sewell .v. Burdick*, [1884] 10 A.C. 74 and *Brandt .v. Liverpool Brazil and River Plate Steam Navigation Co. Ltd.*, [1942] 1 K.B. 575.
[13] [1981] 1 Lloyd's Rep. 213.
[14] The decisions of the Court of Appeal in *The Aramis*, *supra* fn. 9, and *The Gudermes*, [1993] 1 Lloyd's Rep. 311, have placed major limitations on the utility of the doctrine of implied contract.

2. 3. TO WHICH DOCUMENTS DOES COGSA 1992 APPLY?

COGSA 1992 covers bills of lading, sea waybills and ship's delivery orders issued on or after 16 September 1992.

2. 3. 1. BILLS OF LADING

COGSA 1992 does not contain a definition of 'bill of lading', but this is usually defined by reference to its functions. The legislature did not try to define the bill of lading regarding to its functions because the bill of lading will in due course cease to be a document of title when it ceases to grant constructive possession of the goods. Also, the bill of lading will not evidence the terms of the carriage contract where it is issued pursuant to a charter-party.[15] Section 1 (2) (a) of COGSA 1992 provides that references in the 1992 Act to a bill of lading do not include references to a document which is incapable of transfer either by endorsement or, as a bearer bill, by delivery without endorsement.[16] A bill which is indorsed in blank and delivered to the endorsee can be transferred to the next endorsee by delivery alone without the need for a new endorsement and so would be a bearer bill of lading for the purpose of COGSA 1992.[17]

However, a bill of lading which is consigned to a named consignee without words such as "to order" would not be considered as a bill of lading for the purpose of COGSA 1992, because that bill of lading is a non- negotiable document and falls outside s. 1 (2) (a). Therefore, a straight bill of lading will be considered as a sea waybill for the purpose of the 1992 Act, because it evidences or contains the carriage contract and it is a receipt for the goods.[18] Thus, the holder of a straight bill of lading succeeds to the rights of suit as if he

---

[15] Cooper, J., "Carriage of Goods by Sea Act 1992" [1992] 3 Current Law Statutes Annotated. 50- 02.
[16] Like transfer of the bill of exchange, Bill of Exchange Act 1882 s. 31 (3).
[17] By virtue of s. 5 (2) (b) of COGSA 1992.
[18] By virtue of s. 1 (3) (a) of COGSA 1992. However, s. 1 (3) (b) does cover a named consignee in a straight bill who still has to present the bill to obtain delivery. This is because delivery against presentation of the straight bill will be considered in accordance with that contract embodied into that bill.

was the person to whom delivery is to be made under a sea waybill.[19] COGSA 1992 applies to "received for shipment" bills of lading and thus, resolves an issue which has been doubtful for a long time.[20] According to the *dictum* in *Ishag .v. Allied Bank,*[21] a document which acknowledged that the goods are at the carrier's disposal is still a "received for shipment" bill of lading. But that document should provide an undertaking by the carrier to carry the goods to their named destination to the consignee or his assigns, and also should state the name of the ship by which is intended that carriage should be performed.[22]

Being a Lawful 'Holder' of a Bill of Lading

In order to acquire rights of suit against the carrier under the bill of lading contract a third party should become the 'lawful holder' of that bill as defined in s. 5 (2) of COGSA 1992. Sub- sections (a) and (b) provide that a person can be a 'holder' of the bill of lading in three situations: a consignee who is identified in the bill and has possession of it; an endorsee who has possession of the bill as a result of the completion of any endorsement and delivery of it; a transferee who has the possession of the bill as a result of the transfer to him of a bearer bill of lading. Sub- section (c) provides that a person who would have been a holder under these categories but who takes possession of the bill at a time when possession of the bill gives no rights against the carrier to possession of the goods to which it relates also obtains rights under s. 2 (1). An example of this third situation would be when the goods have been delivered to the person who is entitled to them without being yet the person who has acquired possession of the bill at the time of delivery as delivery has

---

[19] For more details see also Bassindale, J., "Title to Sue- The Penultimate Chapter", [1991] 1 OGLTR. 25 at 26.
[20] By virtue of s. 1 (2) (b) of COGSA 1992.
[21] [1981] 1 Lloyd's Rep. 92. For the citation of Lloyd J., see fns. 124- 125 in chap. 1.
[22] For more detail about a "received for shipment" bill as a document of title see sub- title 1. 6. 1.

been made against letter of indemnity.[23] It seems that none of the above situations specifically covers the position of an order bill which has been previously indorsed in blank. That bill can be transferred to a new endorsee by delivery without any new endorsement, so that the bill can be covered by the provisions relating to a bearer bill of lading because that bill has now been converted to a bearer bill of lading.

COGSA 1992 resolves the problems which have been created by The *Aramis* and *The Aliakmon*.[24] The plaintiffs, in both cases, were the lawful holder of a bill of lading and therefore, had COGSA 1992 been in force, they could have sued the carrier in respect of their losses or damages according to the bill of lading contract as a result of the divorce of the acquisition of the rights to sue from the passing of property required by the Bills of Lading Act 1855. But, who is the holder of the bill of lading, for the purpose of COGSA 1992, where the agent of the buyer has the possession of the bill of lading for collecting the goods on behalf of the buyer or as in *The Aliakmon* where the buyer had the bill of lading as agent for the seller? The agent, by virtue of s. 2 (1) of COGSA 1992, acquires the rights of suit against the carrier and so he can sue the carrier for the benefit of his principal by virtue of s. 2 (4).[25] But, the concept of possession is a flexible one to allow the agent to have actual possession and the principal to have constructive possession.[26] Carver argues[27] that where a bill of lading contains a personal endorsement and is in the possession of the agent, by virtue of s. 5 (2) (b) of the 1992 Act, the agent would be considered as the holder of the bill and so his principal would not be considered as the holder for the purposes of the

---

[23] By virtue of s. 2 (2) of COGSA 1992. For the implementation of this section see *infra 'Spent' bills*. Such a bill is known as a 'spent' bill.

[24] In *White .v. Jones*, [1995] 2 A.C. 207 at 265, Lord Goff of Chieveley suggested that the problem of *The Aliakmon* has been solved by the 1992 Act under which rights of suits are available to all holders of bills of lading. The problems in *The Aramis* and The *Aliakmon* are discussed in chap 5.

[25] Therefore, the contractual rights, according to the suggestion of Lord Goff of Chieveley in *White .v. Jones*, *ibid.* at 265, may be transferred by virtue of the transfer of certain documents such as the bill of lading.

[26] Guest, A. G., (*et al*) *Benjamin's Sale of Goods*, 6th Edition, London. Sweet & Maxwell 2002, at para. 18-082. However, the problem would be serious where the bill is a bearer bill or a bill which has been indorsed in blank.

[27] See *Carver on Bills of Lading*, London: Sweet & Maxwell, 2001, at para. 5- 017.

1992 Act. In contrast, the same principle will not be applicable to a bearer bill or an indorsed bill in blank. However, it should be noted that where a named consignee acts as an agent for the shipper, the consignee would obtain rights of suit in its own right under s. 2 (1). In *East West Corporation .v. Dkbs 1912*,[28] the Court of Appeal held that in such circumstances the shipper, having lost its contractual rights under s. 2 (1) could not claim the benefit of the consignee's statutory rights because the consignee was acting as its agent.

Being a Lawful Holder of a Bill of Lading in 'Good Faith'

The person relying on s. 2 (1) should have become a lawful holder of the bill of lading in good faith. COGSA 1992 contains no definition to the "good faith" and therefore, it might be contrasted with s. 90 of the Bill of Exchange Act 1882 and s. 61 (3) of the Sale of Goods Act 1979 which provide that "A thing is deemed to be done in good faith within the meaning of this Act when it in fact done honestly, whether it is done negligently or not". So the concept of good faith would be negatived where the possession of the bill of lading had been acquired by means of fraud or by stealing; also, where the holder had acquired the possession of the bill of lading with knowledge that the previous holder had acquired the possession of that bill by means of fraud or theft.[29] Thomas J., in *The Aegean Sea*,[30] held that if a person obtained a bill of lading honestly this is sufficient to make him a lawful holder in good faith. He then proceeded that "In my view, it therefore connotes honest conduct and not a broader concept of good faith such as 'the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned'".[31]

---

[28] [2003] 1 Lloyd's Rep. 239 at para. 18, ([2003] EWCA Civ. 83).
[29] See *infra 'Possession of the bill' under s. 5 (2) of COGSA 1992.*
[30] [1998] 2 Lloyd's Rep. 39 at 60.
[31] *Ibid.*

Another problem regarding possession of the bill of lading in good faith is where the terms of the initial carriage contract are different from the terms of the bill of lading contract as in *Leduc .v. Ward*.[32] The Court of Appeal held that the terms of the carriage contract between the carrier and the consignee or the endorsee were solely those set out in the bill of lading. The question is whether a holder who actually knew of the terms of the carriage contract between the carrier and the shipper had acquired the possession of the bill of lading in good faith under the COGSA 1992 or not? It seems to be an injustice to allow the holder to enforce the terms of the bill of lading and ignore an oral term related to the route of shipment agreed between the shipper and the carrier of which it is aware.[33] But it is arguable that it is not acceptable to apply the bill of lading contract but to treat the holder as having waived the term as to the route of shipment. This is because, the carrier had the opportunity to check the terms of the bill of lading and should not profit from his fault and be allowed to modify the terms of the bill of lading, even if the holder of the bill of lading actually knew that the shipper had assented to such deviation. However, the awareness of the differences between the initial contract and the bill of lading contract does not affect the good faith of the endorsee. Thus, the endorsee would have the bill in good faith where he had no knowledge of any defect in the transferor's title when the bill of lading was indorsed to him.[34]

The last problem which arises out of the issue of good faith is related to representations contained in the bill of lading. The question would be whether the holder who actually knew that the representations relating to the goods which are contained in bill of lading are untrue had acquired the possession of the bill of lading in good faith under

---

[32] [1888] 20 Q.B.D. 475. For more detail about the facts and the decision see *supra* fn. 15 in chapter 1. See, also, Debattista, C., "The bill of lading as the contract of carriage- A reassessment of *Leduc .v. Ward*" 45 [1982] MLR 652.

[33] See *Carver on Bills of Lading*, *supra* fn. 27 at para. 5- 019.

[34] The contrasting situation is in *The Ardennes*, [1951] 1 K.B. 55, where the terms of the initial contract were for the benefit of the shipper. For more details see *infra the terms of the contract transferred.*

COGSA 1992? There is an argument that if the holder had acquired possession of the bill of lading in good faith, at the same time he is not entitled to the estoppel rule under s. 4 of COGSA 1992 which operates in favour of the holder who does not know the truth. This is because the representations of the goods such as the quantity shipped are not terms of contract but are only representations.[35] It is arguable that the capability of 'good faith' of bearing different shades of meaning for the purpose of different sections of the 1992 Act[36] is supported by art. III (4) of the Hague- Visby Rules which provides that "Such a bill of lading shall be prime facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b), and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third part in good faith". Therefore, the transferee should have acquired the bill of lading without any acknowledgement that all or some of these representations which are mentioned in art. III (3) are untrue, thus good faith is only related to those representations. Also, it is arguable that, these representations should be *prima facie* evidence. So, the carrier has to prove that these representations are wrong or that the holder knew that these representations are untrue. The carrier, through his master has the opportunity to check these representations and should not therefore be allowed to profit from his own negligence. Also, the holder should not be entitled to the estoppel rule under s. 4 of COGSA 1992 which makes these representations conclusive evidence against the carrier where the holder does not know the truth. Nullifying s. 4 in favour of such a person would be on the assumption that the holder who knows that the representations relating to the goods are untrue is not a lawful holder for the purpose of s. 4, since "such an essentially flexible concept as " good faith " should be capable of bearing different shades of meaning for the purpose of different section of

---

[35] See Guest, A. G., *supra* fn. 26 at para. 18- 029.
[36] See *Carver on Bills of Lading*, *supra* fn. 27 at para. 5- 020.

1992 Act".[37] However, such a holder of the bill of lading would still have title to sue under s. 2 (1) of COGSA 1992, but that title would be restricted to the carrier's breach of the carriage contract relating to the goods which are in fact shipped or received for shipment. Therefore, the rights under the carriage contract vested in such a holder of the bill of lading would be less than those vested in a third party who became the holder of the bill of lading, not knowing of the untruth of its representations.

If no goods are shipped at all the problem is solved because there is no bill of lading at common law as what purports to be a bill of lading is in fact a mere 'nullity'.[38] Carver, however, argues that the holder of such a bill of lading, by virtue of s. 4 of the 1992 Act, would still have a cause of action against the carrier under s. 2 (1) of the Act on the following grounds,[39]

> "The alternative argument open to C is that the rights under the contract between A and B have been transferred to him on his having become lawful holder of the bill, under s. 2 of the 1992 Act. This, in turn depends on there having been a 'contract of carriage' between A and B, for it is rights of suit under this contract which are 'transferred to and vested in [C] . . ..as if he had been a party to that contract'. If in consequence of the fact of non- shipment, no such contract had come into existence, nothing could be transferred to C under section 2. The effect of section 4 is to preclude A from denying the fact of shipment and legislative intention appears to have been to give C a cause of action against A on the hypothetical contract of carriage, which would have come into being, if goods had been shipped, even though no such contract may exist in fact. This may amount to basing a cause of action on what is in substance an estoppel. . . ."[40]

Against this, however, there is the fact that a third party would be able to rely on s. 4 of the 1992 Act only if he could prove that the document which he holds is a bill of lading. The carrier under s. 4 is estopped only from denying the fact of *shipment* but not the *existence*

---

[37] See Guest, A. G., *supra* fn. 26 and also, see *Carver on Bills of Lading*, *supra* fn. 27 at para. 5- 020.
[38] This issue was considered in *Heskell .v. Continental Express Ltd.*, [1950] 83 Lloyd's Rep. 438, where the sellers sought to recover the sum they had paid to their buyers for breach of the sale contract. The court held that the issuance of the bill of lading could not constitute a carriage contract, unless the goods were received by the shipowners or his agents for shipments. However, the statutory provisions as to the conclusive effect of statements in the bill of lading will not affect this issue.
[39] See *Carver on Bills of Lading*, *supra* fn. 27 at paras. 2- 017- 019.
[40] See *Carver on Bills of Lading*, *supra* fn. 27 at para. 2- 018.

of a bill of lading. This is because what appears to be a bill of lading is in fact a mere 'nullity' under the common law rules. This line of argument can be supported by the corresponding section under the US law where the words of that particular section gives the holder of a negotiable bill a cause of action against the carrier "the carrier is liable for damages caused the non- receipt by the carrier of any part of the goods", while the third party under s. 4 of the 1992 Act has to establish the acquirement of the contractual rights of suit under s. 2 (1) in order to trigger the application of s. 4. As a result, the third party would not be able to rely on the general rule of estoppel which does not provide such person with a cause of action since he is not an original party.

2. 3. 2. SEA WAYBILLS

The sea waybill is a typical example of a contract for the benefit of a third party. Therefore, it suffers from the same problem of privity in that the consignee who has suffered loss is unable to sue the carrier because he is a stranger to the carriage contract whereas the person who has the right to sue the carrier for that loss has suffered no loss and has no reason to sue the carrier. Even the shipper who has suffered no loss and has the right to sue the carrier might be unable to recover substantial damages. Section 1 (3) of COGSA 1992 resolved the problem of privity by extending the bill of lading legislation to sea waybills issued on or after 16th September 1992.

A sea waybill is not a negotiable document and the transfer of contractual rights thereunder will not be effected by the transfer of possession of that document. Thus, the consignee who is identified in the waybill does not need to be the holder or the lawful holder of that document to acquire the contractual rights. Section 1 (3) of COGSA 1992 provides that a sea waybill is not a bill of lading. It has been noted above that while there is no comprehensive definition of the bill of lading in COGSA 1992, at the same time s. 1 (2) (a) of COGSA 1992 provides that a document which is incapable of transfer either by

endorsement and delivery or as a bearer bill by delivery. Therefore, the phrase "is not a bill of lading" means that a sea waybill is a document which cannot be used as a means of transferring possession in the goods to which it refers, unlike the bill of lading. Moreover, the phrase "not a bill of lading" should be read with s. 1 (3) (b) and s. 5 (3) of COGSA 1992 which are related to the identification of the person who is entitled to the goods which should be delivered by the carrier. A sea waybill which provided for the goods to be delivered to the consignee or "his order" would be converted to a bill of lading which is capable of transfer by endorsement. A sea waybill which made the goods deliverable to 'order' would also be a bill of lading because it would not identify the person to whom delivery was to be made at all and thus, it would be out of the definition of the sea waybill.

In order for the document to qualify as a sea waybill, it should identify the person to whom delivery would be made under s. 1 (3) (b). Under s. 5 (3) it will still be a waybill if it gives power to the shipper to vary the identity of that person within the terms of the document. The ability of the shipper to vary the identity of the person to whom delivery should be made must be done by a notice to the carrier. In short, where the identity of the consignee can be varied by endorsement or by delivery of the document, the document is a bill of lading. In contrast, when the identity of the consignee can be varied only by a notice from the shipper to the carrier, the document is a sea waybill. Therefore, the consignee under the sea waybill can acquire contractual rights without acquiring possession of the document and without also satisfying the requirement of good faith.[41] Although a straight bill requires the consignee to present the bill to obtain delivery, this factor does not preclude such a bill from falling under the sea waybill provisions of s. 1 (3).

---

[41] It was held in *The Chitral*, [2000] 1 Lloyd's Rep. 529 at 532, that the document before the court, for the purpose of s. 2 (5) of COGSA 1992, was a sea waybill rather than a bill of lading, despite the fact that it was in the usual form of a bill of lading but with one important difference in that the words "or order or assigns" were omitted.

For the document to qualify as a sea waybill, it should also be a receipt for the goods and evidence or contain a contract for carriage of the goods by sea.[42] The words of COGSA 1992 do not specify the person by whom the goods must be stated to have been received. Thus, the goods could be received by the carrier or by another person on behalf of the carrier. Moreover, a sea waybill does not need to indicate that the goods have been received for shipment as is the position under the bill of lading. A sea waybill also should evidence or contain the terms of the carriage contract. Delivery of the goods under a sea waybill would be to the consignee who is identified in the document without presentation of that document. Upon which terms can the consignee rely on against the carrier where there are differences between the terms of the sea waybill and the original contract between the shipper and the carrier? According to s. 5 (1) (a), the terms of the carriage contract would be those which are evidenced by or contained in the sea waybill. Therefore, the position under a sea waybill would be the same as under a bill of lading.[43]

2. 3. 3. SHIP'S DELIVERY ORDERS

Ship's delivery orders fell outside the provisions of the Bill of Lading Act 1855. As a result of the restrictions imposed on *Brandt .v. Liverpool* after the decision of *The Aramis* (which is discussed in chapter five), it is doubtful whether a contract could be implied in the case of a ship's delivery order since delivery of the goods to holder of the order could be explained by reference to the existing obligations of the carrier to the bill of lading holder, unless the holder paid freight or other charges to the carrier on delivery.[44] Moreover, as a result of *The Aliakmon*, no claim in tort would be available where the goods

---

[42] Section 1 (3) (a) of COGSA 1992 provides that a sea waybill "is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and. . . .". The reference to carriage by sea does not appear in the definition of a contract of carriage in s. 5 (1) of the 1992 Act.

[43] See *infra The terms of the contract transferred.*

[44] The implied contract was applied in *The Dona Mari*, [1974] 1 W.L.R. 341, where the holder of the delivery order presented it to obtain delivery and paid the freight related to those goods.

covered by the ship's delivery order form part of a large bulk.[45] Therefore, a statutory right of suit needed to be given to the beneficiary of the ship's delivery orders against the carrier. This was achieved by virtue of s. 1 (4) of COGSA 1992, which extended the bill of lading legislation to ship's delivery orders.

According to s. 1 (4), a ship's delivery order is "neither a bill of lading nor a sea waybill" and so it is neither a receipt for the goods nor does evidence or contain the carriage contract, but it is "given under or for the purposes of a contract for carriage". However, a ship's delivery order should contain an undertaking by the carrier to deliver the goods to a person identified in the order itself. An order issued by the shipper requesting the carrier to deliver the goods to a person named in it, is not a ship's delivery order because it contains no undertaking by or to anyone. But, this order can be converted to a ship's delivery order by attornment by the carrier. Oral undertakings by the carrier to the person named in it in accordance with the shipper's request will not convert that order to a ship's one, because the order itself contains no such undertaking. Moreover, an order which contains a promise to the shipper to deliver the goods to a named person will not be a ship's delivery order, because that promise should be addressed to the person to whom delivery is to be made.[46]

The undertaking should be given under or for the purposes of a contract of carriage by sea. Therefore, it should contain an express reference to the carriage contract which would commonly be contained in or evidenced by the bill of lading. It seems that there is no reason not to accept a ship's delivery order as a document which refers back to a contract which is contained in or evidenced by a sea waybill. Could a ship's delivery order

---

[45] See Bradgate, J., & White, F., *supra* fn. 1 at 196. However, a claim in tort would now be available to cargo owner in bulk cargo, as in *The Aliakmon,* by virtue of s. 20 A of Sale of Goods (Amendment) Act 1995.

[46] It was held in *Colin and Shields .v. Weddel & Co., Ltd.*, [1952] 2 All ER. 337, that the document which purported to be a ship's delivery order, was not a ship's delivery order, since it ordered someone other than the carrier or his servants to deliver the goods to the holder, despite the fact that the document was issued by the carrier.

which is issued under charter- party in respect of shipment or part of it, be a ship's delivery order for the purposes of COGSA 1992? A contract of carriage, in relation to a ship's delivery order, is defined, under s. 5 (1) (b), without restriction to a contract contained in or evidenced by bill of lading or sea waybill. Thus, any contract can be covered by that definition as long as it is related to carriage by sea.[47]

The words "goods which include these goods" in s. 1 (4) refer to cases where the ship's delivery order relates to goods which are part of other goods as where goods are shipped in bulk. Suppose the vessel is under a time charter- party and the bill of lading which is issued by the charterer to the shipper and later the shipper sells half of the shipment to another person and a ship's delivery order was also issued by the charterer in respect of that sold half. Is that document which is issued in respect of the sold half of the shipment a ship's delivery order for the purposes of COGSA 1992? The answer depends on who is the contracting party with the shipper, the charterer or the shipowner, who would be the carrier for the purpose of s. 1 (4) (b) of COGSA 1992. Where the carriage contract is between the shipper and the charterer, a charterer's bill, that document would be a ship's delivery order, where it is issued by the charterer for the purposes of COGSA 1992, because the charterer would be the carrier, as being the party of the carriage contract. Where the contract of carriage is between the shipper and the shipowner, a shipowner's bill, then the document which was issued in respect of half the goods by the shipowner would be a ship's delivery order, but a document which issued by the charterer in respect of the other half would not be a ship's delivery order, because the charterer is not the

[47] However, the Law Commissions Report, in respect of the terms of the relationship between the holder and the carrier will depend on the facts of each particular case, refer to "the bill of lading will be incorporated by reference", see the Commissions Report *supra* fn. 2 at para. 5. 30. Therefore, it is arguable that, without such wording, a ship's delivery order could relate back to the charterparty where the charterer is the consignor, even where COGSA 1992 does not apply to charter- party contract.

contracting party with the shipper,[48] unless the charterer has actual, apparent or ostensible authority to issue and sign such document for the shipowner.

The undertaking which should be contained in the ship's delivery order should be to a person identified by the document. Moreover, the delivery of the goods should be made to the same person, otherwise that document could not qualify as a ship's delivery order. Under s. 5 (3) the identity of that person could be varied in accordance with the terms of the document, after its issue. The combined effect of s. 1 (4) and s. 5 (3) would lead to difficulty where the document is issued in a way which makes it being capable of transfer by endorsement or delivery.[49] The problem is that the undertaking which is contained in the document would be to a person other than the person to whom delivery is actually to be made. However, this unsatisfactory result could, arguably, be avoided by providing a term in the document that a change in the identity of the person to whom delivery is to be made should also have the effect of changing the identity of the person to whom the undertaking was given.[50] In *Cremer .v. General Carriers S.A.*,[51] the seller obtained a delivery order making the goods deliverable to his order which related to a part of a larger quantity of goods covered by the bill of lading. The court held that the buyer had a cause of action against the carrier according to the implied contract concept. However, Kerr. J., held that the order is "a ship's delivery order" in the common law sense. The question is whether or not that document is a ship's delivery order, according to s. 1

---

[48] In *The Rewia*, [1991] 2 Lloyd's Rep. 325 at 333, the Court of Appeal held that the bill of lading signed for the master could not be a charterers' bill of lading, unless the carriage contract was made with charterers alone and the person who signed the bill had authority to sign and did that on behalf of the charterers and not the owners.

[49] A ship's delivery order, in principle, is incapable of being a transferable document, since the goods which are its subject matter would be unascertained and therefore, no constructive possession would be passed to the party to whom the attornment was addressed. So that party would acquire a personal right to sue the carrier based on estoppel.

[50] No distinction was drawn by the Law Commission Report between a party originally named in a ship's delivery order and a transferee of such a party.

[51] [1974] 1 All.ER. 1.

(4) of COGSA 1992, and whether it would transfer rights under the carriage contract to the buyer by virtue of s. 2 (1) of COGSA 1992. Kerr J., described that order as

> issued by the shipowner's agents addressed to the master or chief officer or other persons authorising delivery to the holder or to the order of a named person.[52]

The order, in *Cremer v. General Carriers S.A.,* would not be a ship's delivery order for the purposes of COGSA 1992, because it was addressed to and given in favour of the seller. Therefore, the buyer would need to show that the identity of the person to whom delivery was to be made[53] had been varied and so he had replaced his seller as that person.[54]

2. 4. TRANSFERRING CONTRACTUAL RIGHTS UNDER COGSA 1992

Under s. 2 (1) of COGSA 1992, the lawful holder of the bill of lading will be the person who has acquired contractual rights of action against the carrier. Therefore, s. 2 (1) breaks the link between the transfer of the contractual rights and the acquisition of property "upon or by reason of" endorsement or consignment as the Bills of Lading Act 1855. The touchstone of the transfer of the rights of suit is to the lawful holder of the bill of lading rather than the passing of property or being on risk. Moreover, s. 2 (1) gives statutory rights in the case of sea waybills and ship's delivery orders to the person to whom delivery is to be made. I shall now examine in detail the statutory mechanism by which this transfer of rights is accomplished.

2. 4. 1. TRANSFERRING CONTRACTUAL RIGHTS UNDER BILLS OF LADING

'Possession of the bill' under s. 5 (2) COGSA 1992

The three definitions of a 'lawful holder' in s. 5 (2) of the 1992 Act all refer to a 'person with possession of the bill'. What then is the position of a person who is no longer in

---

[52] *Ibid.* at 9.
[53] By virtue of s. 1 (4) (b) of COGSA 1992.
[54] By virtue of s. 5 (3) of COGSA 1992.

physical possession of the bill either because they have lost or the bill has passed to a third party by means of fraud or theft? In neither situation would there be any divestment of rights under s. 2 (5).[55] If the bill was merely lost there would have been no physical transfer to a third party. If the bill were stolen, then the thief would be unable to show that they had become a 'lawful holder' due to the absence of good faith on their part. To require proof of continued physical possession of the bill in such a situation would mean that neither the thief nor his victim would have title to sue the shipowner under s. 2 (1). This is clearly undesirable and it is likely, therefore, that the courts would take the view that the lawful holder who had lost possession of the bill in such circumstances would still be able to sue under the 1992 Act. This view is put forward by Gaskell who, nonetheless, notes that the "cargo owner might have great difficulties of proof in such circumstances".[56] This view can be supported by the language of s. 2 (1) which refers to a person who 'becomes' a 'lawful holder' rather than a person who 'is' a 'lawful holder. However, under US law this problem does not exist since, under Ch. 801 05 the title to the goods and the cause of action depend on one criterion that is whether the bill has been duly negotiated.[57] Furthermore, this problem did not exist under the 1855 Act, since the cause of action was tied to the passing of property.

Furthermore, a *bona fide* holder and a purchaser in good faith should have a cause of action against the carrier, even if his transferor had neither title to the goods nor right to possession of the bill where the transfer of the bill falls within the Factors Act 1889. This is because the transfer would take effect as if the owner had authorised the transaction and so

---

[55] "Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives-
(a) where that document is a bill of lading, from a person having been an original party to the contract of carriage; or
(b) in the case of any document to which this act applies, from the previous operation of that subsection in relation to that document;..."

[56] See Gaskell, N., (*et al*), *Bills of Lading: Law and Contracts*, LLP 2000, at para. 4. 28.

[57] For more detail about US law see *infra* sub- title 2. 6. 2. 1.

the transferee would have title to the goods as well as a cause of action. Otherwise the court might have difficulty in finding an alternative way of imposing liability which would enable the shipowner to escape liability.

Thomas J., in *The Aegean Sea*,[58] held that the physical possession of a bill of lading would not, in itself, satisfy the requirements of s. 5 (2) (b) of the 1992 Act, unless there is some consensual element on the part of the recipient of a bill of lading. Therefore, the meaning of delivery under s. 5 (2) (b) is not just having the possession of the bill but rather accepting that delivery and so obtaining possession of the bill of lading as the result of completion by delivery of the bill by endorsement. A related issue to the physical possession of the bill of lading is whether a claimant can be a lawful holder before coming into physically possession of the bill. Rix J., in *The Giovanna*,[59] albeit *obiter*, agreed with the view that the claimant had possession of the bills of lading once the bank had indorsed and handed them to couriers for despatch to the claimants.[60] Therefore, the exact moment at which the claimants acquired the contractual rights of suit would be once the bank had indorsed and handed them to couriers for despatch. Accordingly, Rix J., accepted that the concept of possession is a flexible one so as to allow the agent to have the actual possession and the principal to have constructive possession.

According to s. 5 (2), the holder of the bill is a named consignee or a person who comes to possess of the bill as a result of "completion of any endorsement" or a person who has possession of the bearer bill, or the person who has the possession the bill of lading which is indorsed in blank. A pledgee, as a bank, who is not a consignee or an endorsee, or has the possession of a bearer bill of lading or a bill which is indorsed in blank, acquires no contractual rights under s. 2 (1) and the carriage contract still remains

---

[58] See *supra* fn. 30 at 59- 60.
[59] [1999] 1 Lloyd's Rep. 867 at 874.
[60] Gaskell argues that the claimants would not have possession of the bills of lading within the meaning of the 1992 Act, if the couriers had been engaged by the bank as it would have been able to cancel the delivery, see Gaskell, N., (*et al*), *supra* fn. 56 at para. 4. 22.

with previous holder. Thus, deliveries of an endorsable bill of lading to a pledgee which do not name it as a consignee or an endorsee will not come within the scope of the phrase "completion of any endorsement". This is because, endorsement of the bill had not been completed by mere delivery of the bill to the pledgee. Otherwise, the pledgee would be the holder of the bill and the endorsee could never become the holder since an endorsement of a bill of lading can not completed twice.[61] For this reason banks generally require the tender of a bearer bill under a letter of credit.

The terms of the contract transferred

COGSA 1992 uses a different way of transferring the contractual rights to the holder of the bill of lading to the one used under the Bills of Lading Act 1855. Under s. 2 (1) of COGSA 1992, the contractual rights are transferred to the holder of the bill "as if he had been a party to that contract" and s. 5 (1) (a) defines the carriage contract as "the contract contained in or evidenced by that bill".[62] In contrast, the contractual rights were transferred under s. 1 of the Bills of Lading Act 1855 as "if the contract contained in the bill of lading had been made with himself".

In *Leduc .v. Ward*,[63] the Court of Appeal held that the terms of the carriage between the endorsee and the carrier were solely those set out in the bill. It, thus, held, on the ground of the true construction of the deviation clause on the face of the bill of lading, that the deviation clause did not cover the deviation to Glasgow. In contrast, the court in *The Ardennes*,[64] held that the carrier was liable for delay resulting from the deviation since the bill of lading was not the carriage contract between the carrier and the shipper but only evidence of the contract. Therefore, where the bill of lading had been indorsed to a person

---

[61] Reynolds, B., "Further Thoughts on The Carriage of Goods by Sea Act 1992 (UK)" 25 JMar.Law & Com. [1994]. 143 at 150.
[62] This definition, unlike that used in relation to the sea waybill and the ship's delivery order, in s. 1 (3) (a) and (4) (a) respectively, does not specify that the contract relate to carriage 'by sea'.
[63] [1888] 20 Q.B.D. 475. For more detail about the facts and the decision see *supra* fn. 15 in chapter 1.
[64] [1951] 1 K.B. 55. For more detail about the facts and the decision see *supra* fn. 10- 13 in chapter 1.

other than the shipper, the carrier would not be liable for delay resulting from the deviation, since the contract between the carrier and the holder of the bill would be the one which is contained in the bill of lading itself, unless there is an estoppel by the shipowner in favour of the endorsee. Since, s. 2 (1) of COGSA 1992 refers only to the actual contract of carriage which is made between the carrier and the shipper, this does not appear to exclude the estoppel on which a transferee can rely on at common law. However, it was held, in *The Heidberg*,[65] (as regards the application of Bills of Lading Act 1855) that the holder of the bill of lading does not take the same contract as that made between the shipper and the shipowner which is evidenced by that bill, but the terms of the contract between the holder of the bill and the shipowner are those which appear on the face and reverse of that bill of lading.[66] Therefore, it is arguable that, the language used in s. 1 of the Bills of Lading Act 1855 is more precise than that used in s. 2 (1) of COGSA 1992.[67]

In the meantime, s. 5 (1) (a) would be helpful in cases such as where a bill of lading is transferred back to the shipper, as where the last holder of the bill of lading is the shipper as a result of transferring the bill back to him. Thus, the rights which he acquires are on the terms of the original carriage contract and not on the terms of the bill of lading, because of the fiction which governs the rights of the holder of the bill other than the shipper "as if he had been party that contract". This is supported by the argument that, if the relationship between the shipper and the carrier is governed merely by the terms of the bill of lading, it will enable the shipper to get out of the terms of the original contract to which he is a party, where they are less profitable to him, by transferring the bill to an intermediate transferee

---

[65] [1994] 2 Lloyd's Rep. 287 at 310.

[66] For the support of this view see *Carver on Bills of Lading*, *supra* fn. 27 at para. 5- 022.

[67] There is an argument that the transferee, as a result of the language of s. 2 (1) (c) of COGSA 1992, steps into the shipper's shoes and so, he might be bound by the terms of the original contract which would able the carrier to use what is available to him as personal defences against the shipper as well as the transferee such as rights of set- off. See White, F., & Bradgate, R., "The Survival of The *Brandt .v. Liverpool Contract, The Gudermes*" [1993] LMCLQ. 483 at 484- 485; also Reynolds, B., *supra* fn. 61 at 152.

and then transferring the bill back to him.[68] Also, COGSA 1992 is intended only to resolve the problem caused by the doctrine of privity of contract which prevents a person who is not party to the carriage contract to take the advantages of that contract.[69]

Initial contract of carriage is void or voidable

The agreement between the shipper and the carrier might also be affected by factors which might render that contract either invalid by law or void or voidable either by mistake or by misrepresentation on the shipper's part. If the contract is voidable, the shipowner must rescind before the bill of lading is transferred by the shipper. Thus, no contractual rights under s. 2 (1) of COGSA 1992 would be transferred to the holder of the bill of lading, because the language which used is in s. 2 (1) gives the holder rights under the contract "as if he had been a party to that contract". In contrast, the language which is used in s. 1 of the Bills of Lading Act 1855 gives the holder of the bill rights "as if the contract contained in the bill had been made with himself". It is arguable, therefore, that the holder under s. 1 of the 1855 Act would not have been affected by these factors and the carrier could not have relied on these factors as against the holder of the bill of lading, on the assumption that the carriage contract had been made between the carrier and the holder of the bill of lading. If the initial contract is void for illegality, the holder of the bill would not be able to sue under the 1992 Act. Would the concept of the new contract springing up on endorsement, as is the case where a charterer/ consignor indorse the bill, help here? It is arguable that this mechanism would not be helpful in this case because the carriage contract between the carrier and the shipper in this case is embodied into the bill of lading rather than the charter- party. Carver argues[70] the words s. 1 of 1855 Act were more

---

[68] An intermediate transferee used solely for this purpose could hardly be said to acquire the bill of lading in 'good faith'. However, the burden of prove that the intermediate transferee has acquired the bill of lading in bad faith, contrary to s. 5 (2) of COGSA 1992 and so, the contractual rights would not be transferred by virtue of s. 2 (2) of COGSA 1992, would be hard to satisfy.

[69] For support for this view see *Carver on Bills of Lading*, *supra* fn. 27 at para. 5- 023.

[70] *Carver on Bills of Lading*, *supra* fn. 27 at para. 5- 027.

favourable to the holder as it treats him as a party to the contract which was actually made. Accordingly, if the carriage contract was either voidable by fraud or void for illegality which could not confer any rights on the shipper and using the fiction that the holder having been party to that ineffective contract can not confer any rights on the holder.

On the other hand, the holder of the bill of lading would have better rights than the shipper in respect of the representations contained in the bill and where a breach by the carrier has been waived by the shipper but not by the holder. Under s. 4 of COGSA 1992, the holder could rely on estoppel against the carrier in respect of the representations contained in the bill of lading, since when he acquires the bill, he neither knew nor had reason to know, of the actual state of the goods at the time of shipment or when they were received for shipment. Nevertheless although, s. 2 (1) may refer to the carriage contract which has actually been made, "it does not appear to exclude the estoppel on which a transferee can rely at common law".[71] Also, the holder of the bill would not be bound by waiver of the shipper in respect of any breach committed by the carrier as deviation even if the holder had notice of the deviation when he took up the bill of lading because, the holder might still be bound to take up the bill by the contract of sale between himself and the shipper.[72] Therefore, the carrier would not be able to rely on exemptions or limitation of liability terms against the holder of the bill who had not waived the breach.[73]

Initial contract of carriage is a charter- party

It has been noted that a bill of lading which is issued under a charter- party in the hands of the charterer is merely a receipt and so it is neither contains nor evidences the carriage contract. Transferring the bill to an endorsee or a consignee will transfer the contractual rights under the bill of lading contract to the holder of it. Before transferring

---

[71] See Guest, A. G., *supra* fn. 26 at para. 18- 085 and for supporting view see *Carver on Bills of Lading*, *supra* fn. 27 at para. 5- 029.
[72] It was concluded in *Cremer .v. General Carrier S.A.*, [1974] 1 All E.R. 1, where the argument was accepted that the carrier can not rely on a contract of sale to which he was no a party.
[73] See Guest, A. G., *supra* fn. 26 at pars. 18-051- 052 and 18- 086.

the bill to the transferee no carriage contract is contained in or evidenced by the bill of lading, but is contained instead in the charter- party.[74] However, the holder of the bill will acquire the contractual rights by virtue of s. 2 (1) of COGSA 1992, but not by virtue of the common law rules.[75] On which terms should the relationship between the carrier and the charterer be governed as a result of transferring the bill of lading to the charterer? COGSA 1992 does not address that problem, nor did the previous Act. In *The Dunelmia*,[76] the charterer had chartered the ship for the purpose of taking delivery of the goods from the seller and took the bill of lading by endorsement when the charterer paid the price. The Court of Appeal held that the relationship between the carrier and the charterer was governed by the terms of the charter- party and the bill of lading in the hands of the charterer is a mere receipt. The decision in *The Dunelmia* would not be different under COGSA 1992, since the rights of the charterer are not extinguished by virtue of s. 2 (5).[77]

However, the relationship between the charterer and the carrier could still be governed by the terms of the bill of lading in cases such as *Calcutta S.S. Co Ltd .v. Andrew Weir & Co.*,[78] where the shipper borrowed money from the charterer while the goods were afloat and then indorsed the bill of lading as security for the advance made to him. The charterer claimed that the relationship between himself and the shipowner should be governed by the terms of the charter- party, but not by the terms of the bill of lading which contained exception clauses from liability. It is important to note that there was no

---

[74] The Bills of lading Act 1855 suffers from the same problem and therefore, the courts held that transferring the bill of lading to the transferee would give contractual rights to the holder against the carrier on the terms of the bill of lading. The courts explained that a new contract "springs up" when the bill is indorsed. see *Rudolph A. Oetker .v. I.F.A. Internationale Frachtagentor (The Almak)*, [1985] 1 Lloyd's Rep. 557 at 560.

[75] The acquisition of the contractual rights by virtue of s. 2 (1) is important for imposing liability under s. 3 (1) of COGSA 1992. Since the acquisition of the contractual rights was based upon the common law, such as implied contract, might impose less extensive liabilities than s . 3 (1).

[76] [1970]1 Q.B. 289.

[77] Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage.

[78] [1910] 1 K.B. 759.

connection between the charter- party and the transaction in pursuance of which the bill of lading was transferred to the charterer and, so the court held that the relationship between the charterer and the shipowner was governed by the terms of the bill of lading. Therefore, even if the charterer to whom the bill is indorsed may fall within the words of s. 2 (1), the court should decide whether the relationship should be governed by the bill of lading or the charter- party according to the factors which were relevant to such an issue as before COGSA 1992.

'Spent' bills

The Bills of Lading Act 1855 caused a problem where the transfer of the bill of lading took place after the bill had been accomplished, as in *The Delfini*.[79] However, s. 2 (2) of COGSA 1992 deals with the transfer of the contractual rights to a person who acquires the possession of the bill after delivery of the goods covered by that bill to him and after it ceased to be a transferable document of title.[80] The effect of s. 2 (2) is to restrict the operation of s. 2 (1) and thus, to prevent endorsement of a bill of lading to a person who has no interest in the goods but wants to buy a cause of action against the carrier. The holder of the bill of lading, under s. 5 (2) (c), extends to include the holder of the "spent" bill. Therefore, under s. 2 (2) (a), the person who has acquired the possession of the bill of lading as a result of arrangement or any contractual, such as sale contract, made before delivery the goods to him, would have contractual rights against the carrier.[81] A limited exception is made in s. 2 (2) (b) deals with reendorsement of the bill to the transferor after delivery had been made to the transferee as result of rejection of the goods as for breach of condition and preserves the transferor's title to sue. The true interpretation to the phrase

---

[79] See *supra* fn. 6.

[80] However, a bill of lading is not 'spent', when delivery is made to a party not entitled to possession of the goods to which it relates. See *East West Corporation .v. Dkbs 1912*, *supra* fn. 28 at para. 19.

[81] The problem which was raised in *The Delfini* would be resolved by virtue of s. 2 (2) (a) of COGSA 1992 and the claimants would have a title to sue the carrier for short delivery of some 275 tonnes less than the bill of lading quantity, since the claimants had acquired the possession of the bill of lading as a result of the sale contract which was made before delivery of the goods.

"goods or documents" should be that the transferee has rejected both documents and goods, because the reacquiring of the contractual rights under a "spent" bill should be to the person who has possession of that bill.[82] However, delivery of the goods to a person other than the holder of the bill of lading is a breach of the carriage contract for which the holder can claim damages by virtue of s. 2 (1). Provided the holder acquires the bill of lading before the goods are actually delivered, the holder's rights to sue the carrier for mis-delivery are not affected by the opening paragraph of s. 2 (2) of COGSA 1992.[83] The same also applies under s. 5 (4) (a) where the goods no longer existed, when the holder acquired the possession of the bill of lading, as a result of destruction which amount to a breach of contract.[84]

Divestment of rights

When rights of suit, under the carriage contract, are transferred to the lawful holder of the bill of lading by virtue of s. 2 (1) of COGSA 1992, the shipper's rights as a original party to the carriage contract are extinguished, by virtue of s. 2 (5). However, the rule in *Dunlop .v. Lambert*[85] can still apply to cases, such as where the bill has never been transferred,[86]where the contractual rights have not been transferred, by virtue of s. 2 (1), to the person who has suffered loss. It also covers suit by the charterer, shipper, whose rights not deriving from the bill, are unaffected by s. 2 (5) of the 1992 Act. Such cases would not be covered by s. 2 (4) of COGSA 1992 which entitles the transferee of rights under the

---

[82] By virtue of both s. 2 (2) and s. 5 (2) of COGSA 1992.
[83] A claimant who is within s. 2 (2) (b) cannot sue the carrier for mis- delivery if delivery was in fact made against an original bill of lading.
[84] See Guest, A. G., *supra* fn. 26 at pars. 18- 091- 18- 093 and, also, see Cooper, J., *supra* fn. 15 at 50- 04.
[85] [1838-39] 7 ER. 824. The court held that the plaintiff as a shipper could sue the carrier in respect of breach of the carriage contract and recover damages in respect of the transferee's loss, as exception to the common law rule which is restricted the plaintiff's right to recover damages only for his own loss.
[86] Also, where the bill is lost in transmission and the transferee never acquires possession of it, or where the bill was delivered to the buyer but, it lacks a requisite endorsement.

carriage contract to recover damages in respect of a third party's loss, but does not entitle the original shipper to do that.[87]

The rights, therefore, which are transferred by s. 2 (1) to the holder of the bill of lading are the shipper's rights under the carriage contract which are contained in or evidenced by the bill of lading by virtue of s. 5 (1) (a) of COGSA 1992. But, what about the shipper's rights which are contained or evidenced by some other contract such as the charter- party? The leading modern case on this point is *The Albazero*[88]where the plaintiff, as a charterer, tried to recover the value of the oil, for benefit of the holder of the bill, which was lost by reason of the carrier's assumed breach of contract.[89] The House of Lords rejected the plaintiff's claim on the ground of the general principles of the law of contract which enables him to recover damages for his own loss, but not for loss that has been suffered by a third party. The reasoning of the House of Lords means that the principle[90] in *Dunlop .v. Lambert* cannot be applied where the person who has suffered loss has a direct contractual relationship with the carrier by virtue of s. 2 (1) of COGSA 1992,[91] or an implied contract at common law. The decision of the House of Lords would have been different had the sale contract between the seller, as charterer, and the buyer contained terms which left the loss during transit with the seller. The loss which resulted from the carrier's breach of contract would have been suffered by the seller as a charterer who could sue the carrier for substantial damages for breach of the charter- party, but not the bill of lading contract. Recovery of a third party's loss is also possible when the claimant is the owner of the goods at the time they are lost or damaged, notwithstanding that risk has

---

[87] Since the shipper could not, as a result of the transfer of the bill of lading back to him, become a lawful holder according to s. 2 (1) (a) which would undermine the intention of COGSA 1992 to resolve the privity problem which prevents a person who is not party to the carriage contract to take advantages of that contract.
[88] [1977] A.C. 774.
[89] The claim under the bill of lading contract had expired by virtue of art. III (6) of the Hague Rules, while the claim under the charter- party had not been expired yet.
[90] Which would be applied to the contract between the carrier and the claimant whether that contract was contained in bill of lading or charter- party.
[91] Or as in *The Albazero, supra* fn. 88, by virtue of s. 1 of the Bills of Lading Act 1855.

already passed under the sale contract to the third party. In *The Sanix Ace*,[92] the end- users who suffered the loss had no contractual rights against the carrier, since no bill of lading was indorsed to any of them, but instead they received a copy of the single bill which covered the whole bulk. The court, therefore, held that the charterer could claim substantial damages for the benefit of the end- users[93] where the only cause of action against that carrier was in contract while the end- users could not bring action against the carrier because of the lack of the contractual relationship between them and the carrier. The goods were the shipper's goods at the time of damage, even if they were not at his risk but at his buyer's risk, he still could sue and recover in full. This could be regarded as an exception to the rule against recovery for third party's loss that is distinct from *Dunlop .v. Lambert* and unaffected by *The Albazero*. Therefore, the rights which are affected by s. 2 (5) of COGSA 1992 are those of the original party to the carriage contract which is defined by s. 5 (1) (a) as the contract contained in or evidenced by the bill of lading, but not the contract contained in the charter- party. It should also be noted that rights of suit in bailment remain unaffected by s. 2 (5) as held by the Court of Appeal in *East West Corporation .v. Dkbs 1912*.[94]

The rights of the intermediate transferee are also extinguished where the contractual rights under the bill of lading are transferred by virtue of s. 2 (1) to his transferee. Thus, where the transfer of the contractual rights to the second transferee is not by virtue of s. 2 (1), such as where the bill was delivered to him without a requisite endorsement, the intermediate transferee's rights would not be extinguished. The first transfer will have extinguished the rights of the original party to the carriage contract by virtue of s. 2 (5), while the second transfer will not have this effect, by virtue of s. 2 (1).

---

[92] [1987] 1 Lloyd's Rep. 465.
[93] The damages would be held on trust for the charterer's buyers.
[94] See *supra* fn. 28 at para. 45.

Moreover, where the bill of lading has been transferred from the shipper to the charterer, it would be a mere receipt in the hands of the charterer and so, the transfer of the contract to the charterer was not by virtue of s. 2 (1) and so, s. 2 (5) (a) would not apply since the charter- party is not a carriage contract within s. 5 (1) (a) of COGSA 1992. Also, the transfer of the bill of lading to a new transferee would not extinguish the charterer's rights under the charter- party. However, the effect of that transfer would be governed by the common law principles which have been mentioned above.[95]

Extinction of the seller's rights by s. 2 (5) where the bill has been transferred according to s. 2 (1) seems unexceptional where the risk passes to the buyer on shipment. But, risk may remain on the seller, such as a c.i.f. out-turn contract and also, the seller may suffer losses as result of breach of the carriage contract which are not associated with the passing of risk such as loss caused by a delay in loading. However, the Law Commissions introduced some reason for adopting this line of policy.

First, it reflects the position under s. 1 of the 1855 Act which used the verb "transfer" and it never was clear whether the rights of the shipper were extinguished by that transfer. Moreover, COGSA 1992 Act uses the same verb, but to avoid the unclear position under the 1855 Act, it was necessary to clarify the position by providing under s. 2 (5) that such transfer shall extinguish the rights of the original party under the carriage contract. Therefore, it was unacceptable to preserve the old law, which did not apply to sea waybills, to create new anomalies.[96]

Second, while the rights of the original party are extinguished where the goods are shipped under a bill of lading, those rights are not extinguished where the goods are shipped under a "straight" bill of lading which is a sea waybill for the purpose of the Act or under a sea waybill or a ship's delivery order. The Commissions' reports treat the waybill

---

[95] See Guest, A. G., *supra* fn. 26 at para. 18- 092. For the common law principles which governs this sort of transfer see *supra Divestment of rights*.
[96] See Bradgate, R., & White, F., *supra* fn. 1 at 199.

differently from the bill of lading on the ground that the waybill is not a document of title and giving the shipper the right of disposal while extinguishing his rights under the carriage contract might lead to contradictory results. However, while this could be acceptable it does not justify the shipper retaining those rights after the delivery has been made to the consignee. Moreover, the rights of the shipper under the charter- party as a charterer are not extinguished on the ground that the bill of lading in the hands of the charterer is a mere receipt. The position under the bill of lading is nearly the same, since the bill of lading is not the carriage contract, but contains or evidences the terms of that contract. So, the bill of lading in the hands of the shipper performs the same function as where the initial contract of carriage is contained in a charter- party. A minority view was expressed by Clive who adds "To introduce a distinction between charterparties and other contracts of carriage under or pursuant to which a bill of lading is issued- where no such distinction appears on the face of the draft Bill- seems to me to be confusing and unsatisfactory".[97]

Third, while s. 2 (5) of COGSA 1992 extinguishes the rights of the shipper as original party to the carriage contract, his liabilities under that contract are expressly preserved under s. 3 (3) of COGSA 1992. In contrast, the Bills of Lading Act 1855, by virtue of s. 2, only expressly preserved the shipper's liabilities for freight.[98] Thus, under COGSA 1992, the original party to the contract is exposed to liabilities under that contract, but without the rights to enforce it. Also, the Commissions were of the view that to allow the shipper to preserve rights of suit against the carrier would "undermine the security of

---

[97] See Clive, E. M., "Note of Partial Dissent" in The English and Scottish law Commissions, *Rights of Suit in Respect of Carriage of Goods by Sea,* (1991) 196 Eng L.C.R. and 130 Scot L.C.R. 41 at 43.

[98] At the same time, the shipper would be liable to the carrier, under the common law, for a duty not to ship dangerous cargo and also, it was held in *The Giannis N.K.*, [1998] 2 W.L.R. 206, at 217, that "the liability of a shipper for dangerous goods at common law, when it arises, does not depend on his knowledge or means of knowledge that the goods are dangerous". For more details see Rose, F.D., "Liability for dangerous goods- *The Giannis N.K.*" [1998] LMCLQ. 480 and Girvin, S. D., "Shipper's Liability for the Carriage of Dangerous Cargoes by Sea" [1996] LMCLQ 487.

the new holder by anticipatory action".[99] The shipper as a original party to the carriage contract cannot demand delivery from the carrier without the presentation of the bill of lading, but he can bring a claim against the carrier for loss or damage to the goods even if the risk had passed to the holder on shipment. But, the shipper has no motive to do that and even if he did that he would not be able to recover substantial damages.[100]

Finally, the Commissions suggested that when the shipper or the intermediate transferee does bear the risk of loss, they can protect themselves by suing the carrier in tort or by assignment of the holder's rights of suit. There are two objections to this. First, a suit in tort might well expose the carrier to a liability which is greater than the one under the carriage contract. Secondly, assignment would give the shipper or the intermediate holder greater rights than those which they would have had under the original contract.[101]

Recovery of third party losses

In some cases the person who has suffered loss is not the person who has acquired contractual rights under the carriage contract, by virtue of s. 2 (1) of COGSA 1992, against the carrier. Therefore, s. 2 (4), entitles the holder of the bill of lading who has acquired contractual rights to sue the carrier for breach of contract for the benefit of the person who had suffered loss resulting from the carrier's breach of the carriage contract. However, the person who is entitled to sue the carrier for the benefit of another person who had suffered loss must have acquired the contractual rights by virtue of s. 2 (1) of COGSA 1992. Therefore, the shipper who is the original party to the carriage contract can not, under s. 2 (4), sue in respect of the carrier's breach for the benefit of the person who had suffered

---

[99] See the Commissions Report *supra* fn. 2 at para. 2. 34 (iii).
[100] As in *The Albazero*, *supra* fn. 88.
[101] Under s. 4 of the 1992 Act, the carrier is estopped from denying the accuracy of the statements in the bill of lading against the holder of that bill. However, these statements are only *prime facie* evidence as against the shipper.

loss, since the shipper has acquired the contractual rights against the carrier as an original party, but not by virtue of s. 2 (1) of COGSA 1992.[102]

However, the shipper as an original party to the carriage contract still can sue the carrier for breach of that contract for the benefit of the person who had suffered the loss according to *Dunlop .v. Lambert*, as an exception to the common law rules. The entitlement of the shipper as an original party to sue the carrier for a breach of a contract which is not covered by COGSA 1992 would not be subject to any restriction that may be imposed by s. 2 (4). Thus, the shipper can still claim against the carrier under the carriage contract which is embodied in a charter-party. Therefore, s. 2 (4) will not apply to a charterer who is suing[103] for the benefit of the person who had suffered loss, because the bill of lading which had been transferred to the charterer is, in his hand, merely a receipt and so, no rights under the bill of lading would be vested in the charterer by virtue of s. 2 (1) of COGSA 1992.[104]

Under s. 2 (4) of COGSA 1992, the person who had suffered loss should be "a person with any interest or right in or in relation to goods to which the document relates". In order to sue in tort, as in *The Aliakmon*, the person should have "either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred".[105] It is, moreover, not sufficient, for a tort action, that the plaintiff has a contractual right that the goods should be delivered to him or that the goods were in his risk.[106] Therefore, it is not sufficient for the person who has suffered loss that the goods were at his risk. Consequently, there is a risk that s. 2 (4) of COGSA 1992 would not be

---

[102] But, an endorsee could sue the carrier, by virtue of s. 2 (4) of COGSA 1992, for the benefit of the shipper.
[103] NB; his right to substantial damages under the charter- party will be subject to *The Albazero*, *supra* fn. 88.
[104] Another reason for not applying s. 2 (4) to the above case as in *The Albazero*, [1977] A.C. 774, is that the charterer had transferred the bill of lading to the buyer and so, any rights which the charterer may have had as a transferee of the bill of lading would have been extinguished by s. 2 (5) of COGSA 1992. See Guest, A. G., *supra* fn. 26 at para. 18- 095.
[105] *The Aliakmon*, *supra* fn. 9 at 910.
[106] *The Wear Breeze* [1969] 1 Q.B. 219.

available to the buyer where the risk of loss has passed on shipment, but the property has not passed yet or for the shipper who have sold the goods at his risk and parted with the property, or where the shipper wished to claim against the carrier for losses for breach of contract such as delay in loading on the ground that neither the shipper nor the buyer is "a person with any interest or right in or in relation to goods to which the documents relates". This view can be supported by the fact that the Law Commissions, when recommending the inclusion of s. 2 (4), contemplated its use by an agent who holds the bill of lading to take delivery of the goods or a bank named as the consignee in the bill of lading.[107] Also, the Law Commissions, during the discussion of the effect of the inclusion of s. 2 (5), pointed out that the seller as well as the intermediate holder, in these situations, can arrange an assignment of the buyer's rights against the carrier.[108]

However, the English courts should examine other statutory provisions dealing with the words 'interests or 'rights', in particular s. 5 (2) of the Marine Insurance Act 1906, and whether they have been held to cover a party who has the risk in the goods but not the ownership. It seems that anyone who has risk in the goods at the time they are damaged, under s. 5 (2) of MIA 1906, will have an insurable interest in them. Therefore, it can be argued that a person with an insurable interest in the goods can be regarded as having an interest in the goods according to s. 2 (4) of COGSA 1992. This argument can be supported by the words of s. 2 (4) which provides "to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised". This is because these words would be meaningless if the third party was anyone other than

---

[107] See the Commissions Report *supra* fn. 2 at para. 2. 27. See, too, *Carver on Bills of Lading*, *supra* fn. 27 at para. 5- 070, where it is submitted that s. 2 (4) (a) requires the person for whose benefit the action is brought to have 'interest or right' and also to suffer loss otherwise the reference to 'interest or right' would be mere surplusage.

[108] See the Commissions Report *supra* fn. 2 at paras. 2- 38- 39 and 2. 40- 41.

the shipper, since the relationship between the carrier and anyone other than the shipper would be exclusively on the terms of the bill of lading.[109]

Section 2 (4) of COGSA 1992 provides that the holder of the bill who has acquired contractual rights "shall be entitled to exercise those rights" to sue the carrier for the benefit of the person who had suffered loss as a result of breach the carriage contract. The language of this section does not require that person to sue, but merely gives him the ability to do so. Moreover, COGSA 1992 provides no machinery for the person who had suffered the loss to compel the holder of the bill to exercise those rights. The only solution for the buyer who has no contractual rights against the carrier is to include in the sale contract a term which requires his seller to exercise the rights under s. 2 (4) for his benefit. But this solution is not always practicable since it requires the buyer to take legal advice at the time the sale contract is concluded.

2. 4. 2. TRANSFERRING CONTRACTUAL RIGHTS UNDER SEA WAYBILLS

Under s. 2 (1) (b) rights of suit are given under a sea waybill to the person to whom delivery is to be made rather than to the named consignee. This is because the sea waybill is not a transferable document of title and the shipper retains rights of disposal over the goods until delivery, unless he contracts otherwise. Therefore, giving the rights of suit to the named consignee from the moment of consignment will prevent the shipper from exercising his rights of disposal.[110] Being the original party to the carriage contract contained in or evidenced by the sea waybill, the shipper can sue the carrier without the need for statutory rights to be given to him.

---

[109] In contrast to the suggestion that the damages should only be subject to the terms of the bill of lading. Since, s. 5 (1) (a) of COGSA 1992 defines the carriage contract as contained in or evidenced by the bill of lading. See Guest, A.G., *supra* fn. 26 at para. 18- 096.
[110] See Cooper, J., *supra* fn. 15 at 50-04.

However, what has been said about the language which has been used in s. 2 (1) of COGSA 1992 in respect of the bill of lading still applies to the sea waybill.[111] But, the named consignee in the sea waybill would not have any better rights than the shipper in respect of the representations contained in waybill, since s. 4 of COGSA 1992 would apply to a bill of lading but not to a sea waybill. The relationship between the carrier and the charterer who has chartered the ship for the purpose of taking delivery from the shipper and also who became a named consignee, as in cases such as *The Dunelmia*,[112] would be governed by the terms of the charter- party, even if it would appear that the rights which have been acquired by the charterer as a named consignee are those under the contract between the carrier and the shipper by virtue of s. 2 (1) (b) of COGSA 1992. But, in a situation such as in *Calcutta S.S. Co Ltd .v. Andrew Weir & Co*[113] where the shipper as an original party directs the carrier to deliver the goods to the charterer, the rights which have been acquired by the charterer would be governed by the terms of the contract which is contained in or evidenced by the sea waybill. This is because the charterer is the person to whom delivery is to be made by virtue of s. 2 (1) (b) of COGSA 1992, and the subsequent direction was not in the contemplation of the charterer and the carrier when they entered into the charter- party.

Also, the shipper as an original party to the carriage contract has the power to redirect the carrier to deliver the goods to someone else rather than the named consignee in the sea waybill, since the waybill is not a transferable document of title and the shipper has the right of disposal. Therefore, where the shipper exercises his power to redirect the carrier to deliver the goods to a person other than the named consignee, the rights of the named consignee cease and those rights are vested in the new person to whom delivery is to be made. Suppose the named consignee sells the goods and asks the shipper to redirect

---

[111] See *supra The terms of the contract transferred.*
[112] [1970] 1 Q.B. 289.
[113] [1910] 1 K.B. 759.

the carrier to deliver the goods to the new buyer, but the shipper's directions have not yet reached the carrier on arrival of the ship. Nevertheless, the carrier agrees to deliver the goods to the new buyer who suffers loss as result of the carrier's breach, but who has acquired no contractual rights against the carrier by virtue of s. 2 (1) (b) of COGSA 1992, since he was not yet the person to whom delivery was to be made when delivery was actually made. In such a case, the named consignee who has acquired contractual rights can sue the carrier for the benefit of the person who had suffered loss by virtue of s. 2 (4) where the requirements of that section were satisfied.[114]

Under s. 2 (5) (b) of COGSA 1992, the rights of the shipper as an original party to the carriage contract which is contained in or evidenced by the sea waybill are not extinguished. The application of s. 2 (5) (b) of COGSA 1992 depends on the terms of the carriage contract contained in a sea waybill, so where the shipper divests his right of disposal over the goods to the named consignee, he will not lose his rights against the carrier as an original party to the carriage contract. The justification for treating the shipper under a sea waybill differently is the contradiction which would result from retaining the right of disposal, including the right to have the goods delivered to himself without the rights which might need to sue the carrier in the event of loss or damage to the goods. However, the carrier would not be liable twice for the same loss, since double recovery would be avoided on the ground that one person could recover substantial loss while the other could recover nominal loss.

2. 4. 3. TRANSFERRING CONTRACTUAL RIGHTS UNDER SHIP'S DELIVERY ORDERS

Under s. 2 (1) (c) of COGSA 1992, the contractual rights, under the carriage contract, are vested in the person to whom delivery is to be made according to the terms of the ship's

---

[114] For the implementation of s. 2 (4) of COGSA 1992 see *supra Recovery of third party losses*.

delivery order. A ship's delivery order might be issued under a bill of lading or a sea waybill and so, the contractual rights which are vested in the person to whom delivery is to be made would be transferred as if that person had been party to the bill of lading contract or the sea waybill contract.

The possession of the ship's delivery order is important for the acquisition of contractual rights against the carrier. In principle, the acquisition of contractual rights against the carrier does not depend upon the possession of the ship's delivery order. The person who is identified in the order as the person to whom delivery is to be made does not need to be the holder of the ship's delivery order in order to acquire the contractual rights. But, this principle should be read in conjunction with s. 2 (3) (a) of COGSA 1992 which provides that "shall be so vested subject to the terms of the order". Therefore, where the ship's delivery order contained a term which provides that the delivery of the goods would be against the presentation of the ship's delivery order, contractual rights could be acquired only by a person with the possession of that ship's delivery order. However, there is no requirement that the possession of the ship's delivery order should have been acquired in good faith as in the bill of lading.

The carriage contract in respect of a ship's delivery order, under s. 5 (1) (b), is "the contract under or for the purposes of which the undertaking contained in the order is given". The bill of lading, as has been noticed above, is merely a receipt in the hands of the charterer and the carriage contract between the charterer and the carrier is the charter- party itself. Therefore, what are the terms of the carriage contract between the carrier and the person to whom delivery is to be made under a ship's delivery order, where the charterer who has the bill of lading which is merely a receipt in his hands has asked the carrier to issue a ship's delivery order for the goods to that person? The carriage contract, in this case

according to s. 5 (1) (b) of COGSA 1992, is the charter- party,[115] because the only contract between the parties is the charter- party and the undertaking which is contained in that order was under or for the purpose the carriage contract which is the charter- party.[116] Suppose that the ship's delivery order which is issued in the above case contains reference to the bill of lading rather than the charter- party and provides that delivery of the goods would be against the presentation of that order. The concept of a "new contract" which 'springs up' on transfer of the bill of lading by the charterer to an endorsee would then have to be applied to such a ship's delivery order. The justification of the extension of the above concept to a ship's delivery order is that it provides a commercially convenient result.[117]

The transmission of the ship's delivery order depends upon the terms of the order and so, the last buyer who has no possession of the ship's delivery order, where the delivery of the goods is made against the production of that order, would not be able to take delivery. However, if the intermediate buyer who has the possession of that order took delivery, he would be able to sue the carrier for breach of contract according to s. 2 (4) where the requirements of that section were satisfied, since he has acquired contractual rights against the carrier by virtue of s. 2 (1) (c) of COGSA 1992. But, what if the carrier and the ultimate buyer without possession of the order agreed to take delivery of the goods against a letter of indemnity? Should the ultimate buyer be regarded as the person to whom delivery is to be made according to the undertaking contained in that order? It is arguable that the ultimate buyer in this situation might acquire contractual rights against the carrier, provided he later acquired that order as is the position with a "spent" bill of lading in s. 2 (2) of COGSA 1992.

---

[115] This is a surprising conclusion since the Law Commission Report in pars. 5.25- 5.31 relating to ship's delivery orders contain references only to the bill of lading. Also, the non- application of COGSA 1992 to charter- parties.
[116] By virtue of s. 5 (1) (b) of COGSA 1992.
[117] See Guest, A. G., *supra* fn. 26 at para. 18- 156.

Where the ship's delivery order relates to part of a shipment, the contractual rights which are vested in the person to whom delivery is to be made relate only to that part of shipment according to s. 2 (3) (b) of COGSA 1992. Also, the rights of the original party in the bill of lading are extinguished according to s. 2 (5) (b) of COGSA 1992. But, s. 2 (5) (b) would not strip the lawful holder of the bill of lading of its rights of suit under s.2 (1) relating to the ship's delivery order. However, the application of s. 2 (5) (b) would not make the carrier liable twice for the same loss, since the common law rules allow the contractual party to recover damages only for his own losses.

2. 5. THROUGH AND COMBINED TRANSPORT BILLS OF LADING

2. 5. 1. THROUGH BILLS OF LADING[118]

A through bill of lading is related to a successive carriage of goods by sea under one document. The question of whether a through bill of lading is covered by COGSA 1992 is related to the questions of whether this document is covered by the mercantile custom which is recognised by *Lickbarrow .v. Mason* and whether this document is a traditional bill of lading. The carrier, under a through bill of lading, undertakes to be responsible for the goods from the point of receipt to the point of final destination and so the carrier would be responsible for the goods throughout the entire voyage, even in the event of transhipment or substitution. Therefore, the holder under a through bill of lading will have the same level of security as under the traditional bill of lading. It was held in *Holland Colombo .v. Segu Mohamed Khaja Alawdeen*,[119] that such a through bill of lading would not be a good tender under a c.i.f. contract, Lord Asquith of Bishopstone introduced that "A bill of lading with a transhipment clause is not necessarily a bad tender under a c.i.f. contract: but it must in some way give 'continuous documentary cover' in respect of the

[118] For details about types of through bills of lading see sub- title 1. 6. 2. of chap. 1.
[119] [1954] 2 Lloyd's Rep. 45 at 53.

goods over the whole transit . . . and a bill of lading issued by the shipowner who by the transhipment terms in it disclaims all liability in respect of the goods in the event and as from the time of transhipment, gives no such 'continuous' cover". A through bill of lading would normally be a "shipped" bill which is issued by the shipowner[120] and a through bill of lading is accepted by the modern mercantile practice in the same way as a traditional bill of lading. Moreover, it is transferred from one party to another by endorsement and delivery and the parties to the sale contract are willing to pay the price of the goods in return of such document and also, it is accepted by banks in return for a loan to finance the sale transaction. A through bill of lading, under both UCP 400 and 500, is treated as the same way as a traditional bill of lading where the entire ocean carriage is covered by one and the same bill of lading, since the only difference between them is that the carrier is obliged to sub- contract on- carriage from the point of transhipment on his own name and at his expense.[121] Therefore, a through bill of lading is similar to a traditional bill of lading in every aspect apart from the fact that the carrier under a through bill of lading is obliged to sub- contract on- carriage from the point of transhipment in his own name, which is a distinction in fact, but not in law.[122] The scope of application of COGSA 1992 would, therefore, seem broad enough to cover a through bill of lading.[123]

In contrast, a false through bill of lading under which each carrier undertakes to be only responsible for the goods whilst in his possession would not provide the shipper with the same level of security as the traditional bill of lading, since the issuer of this bill would escape from liability for the periods which fall outside the mandatory 'tackle to tackle'

---

[120] If a through bill of lading is issued in the form of a "received for shipment" bill, it could be converted, under art. III (7) of the Hague- Visby Rules, into a "shipped" through bill of lading by notation on the bill which would confirmed the time of shipment, the name of the ship and the date of shipment.

[121] See art. 23 (b-d) of UCP 500 and art. 29 of UCP 400.

[122] For support for this view see Todd, P., *Modern Bills of Lading*, 2nd Edition, London: Blackwell Law 1993, at p. 69 and Tetley, W., *Marine Cargo Claim*, 3rd Edition, Montreal: International Shipping Publication- BLAIS 1988, at p. 928.

[123] Since, the law commission found that there is no evidence that this document has any particular problem of privity which is different from the traditional ocean bill of lading. See the Commissions Report *supra* fn. 2 at para. 2. 49.

period of liability under the Hague- Visby Rules.[124] Also, there is a fundamental difference between this document and the previous one which contains no undertaking by one carrier to deliver the goods to the final destination. Under this kind of document, there are several carriers and a carrier's liability could be shuffled off in respect of damage or loss to the goods on the ground that loss or damage cannot be localised. This problem can be avoided by demanding a receipt or a bill regarding the apparent good and condition of the goods. However, it would be difficult in some kinds of transport, such as containerised transport, to determine the point of damage or loss and so identify the carrier who is responsible for the damage or loss of the goods. This receipt would not resolve the problem of the existence of several carriers since the level of liability of each carrier might be different as well as the time bars of action.[125]

It is, therefore, arguable that a false through bill seems different from the traditional bill of lading, in particular, that it does not provide the shipper with the same level of security as the traditional bill and so, it should be treated differently. This document is not really a traditional bill of lading and would probably not be a document of title. There may also be doubt as to whether it is covered by COGSA 1992, even for that part of contract which was personally performed by the issuer of the document, since s. 1 (2) applies only to a document of title which is capable of transfer and contains an undertaking by the issuer to deliver the goods to their destination. [126]

2. 5. 2. FREIGHT FORWARDER BILLS

The questions of whether a freight forwarder bill is a true bill of lading or whether it can be a document of title and so covered by COGSA 1992 have never been answered by the

---

[124] See *Holland Colombo .v. Segu Mohamed Khaja Alawdeen*, [1954] 2 Lloyd's Rep. 45 at 53.
[125] See Palmer, N., & McKendrick, E., (*et al*) *Interests in Goods*, 2nd Edition, London and Hong Kong: L.L.P. 1998, at p. 564.
[126] For a contrasting point of view see Tetley, W., *supra* fn. 122 at p. 929; Boyd, S. C., (*et al*) *Scrutton on Charterparties and Bills of Lading*, 20th Edition, London: Sweet & Maxwell 1996, at art. 181.

English courts. In *Carrington Slipways Pty Ltd .v. Patrick Operations Pty Ltd*,[127] there were two bills of lading, one of them a house bill issued by a freight forwarder and the other an ocean bill issued by the time charterer as the actual carrier. The cargo of two diesel engines was damaged by the stevedores who claimed protection under the Himalaya clause in either or both bills of lading. However, it was held by the Court of Appeal in Australia that the stevedores would be protected by the Himalaya clause in the ocean bill of lading as the freight forwarder was authorised to enter into a contract of carriage and to procure an ocean bill of lading from the actual carrier on behalf of his principal. Therefore, the plaintiff, as undisclosed principal, would have the benefit of and be bound by the ocean bill of lading which was the actual carrier's bill.[128] The Court of Appeal considered the question of whether the freight forwarder's bill was a bill of lading. It held that it is not a bill of lading[129] since there was no evidence that the freight forwarder or his agent had any authorisation from the charterer or the shipowner to issue or to sign any bill of lading in respect of those goods.

Sanson has argued that a freight forwarder bill, if made "to order", is a negotiable bill of lading and it would be a document of title and so, it should be covered by COGSA 1992. He also argues that a "House Bill Of Lading" is not a bill of lading, but it is a merchant's delivery order which grants neither possession nor property to the holder but a right to require delivery of the goods from the issuer and so is not included within COGSA 1992. However, a freight forwarder's bill should be treated as a true bill since, the issuer

---

[127] [1991-92] 24 N.S.W.L.R. 745.

[128] *Ibid.* at 753. Therefore, the carrier would avoid the risk of not obtaining any contractual benefits from their bills as against the consignee because of the interposition of another carrier. There was no reference, by the Court of Appeal, to arts. 25 and 26 of the UCP which might give a useful guidance in determining whether the so- called bill was a negotiable document or not. Hetherington, S., "Freight Forwarders and House Bills of Lading, *The Cape Comorin*" [1992] LMCLQ. 32 and Hetherington, S., "Freight forwarders' liability- *The Oceania Trader*" [1993] LMCLQ 313.

[129] The Court of Appeal held that the so- called bill was not a bill of lading according to the description of the bill of lading in Scrutton on Charterparties and Bills of Lading, 19th Edition, 1984, at 2; *Sewell .v. Burdick* [1884] 10 A.C. 74 at 105, *The Marlborough Hill* [1921] 1 A.C. 444 at 450- 451 and Freight Forwarders, Hill, [1972] D. J at 185- 186.

has contracted as a principal, as a carrier, who would be responsible for the goods during the entire transit and so, the freight forwarder can be treated as bailee with authority to sub-bail. Moreover, the freight forwarder's bill is approved by art. 30 of the UCP 500 and previously by art. 25 (d), 26 c (iv) of UCP 400. [130] Gaskell argues[131] that such bill of lading is essentially the same as a bill issued by a charterer which represents a widespread shipping practice.

However, a bill issued by a NVOCC, if not treated as a true bill of lading, falls within the waybill sections of COGSA 1992. This is because the Act defines a sea waybill as a document which contains or evidences "a contract of carriage *by sea*". As against this, there is the fact that s. (3) (b), in defining a sea waybill refers to a document that "identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract". While this might cover the named consignee, the definition does not easily cover the situation of other third parties, such as one who has taken the NVOCC bill by endorsement from the consignee, or a party who is in possession of a bearer bill issued by an NVOCC.

2. 5. 3. COMBINED TRANSPORT DOCUMENTS[132]

A combined transport document is a document which relates to carriage of goods, at least, by two different kind of transportation such as sea and rail.[133] However, a combined transport document differs from a through bill of lading in one important aspect which is that a combined transport document can be issued by the actual carrier as well as by a person, such as the multimodal transport operator, who accepts responsibility for the goods

---

[130] See Sanson, N., "Carriage of Goods by Sea Act 1992- *The Practice and Legal Implications*, Conference Documentation, IBC Legal Studies and Services Limited Maritime Law Division 1993, SAS Portman Hotel, London W 1. 1 at pp. 6- 11.

[131] See Gaskell, N., (*et al*), supra fn. 56 at para. 1. 42.

[132] See in general Proctor, C., *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document*, Pretoria- Interlegal 1997, in fn. 108 of chapter 5.

[133] A combined transport document is preferable by the shipper, since he needs only to contract with one person to carry the goods to the final destination by different kind of transportation, instead of contracting with different person in respect of each leg of transportation.

through out the entire voyage, but not being the actual carrier. Gaskell argues that a bill of lading issued by a NVOCC, other than the actual shipowner, should not cause any problem. This is because such bill is similar to a bill issued by a charterer which represents a widespread shipping practice. In his view, the essential question is whether the charterer assumes the primary contractual responsibility of a carrier. Therefore, the charterer who assumes such responsibility can be termed as a NVOCC and so a NVOCC' bill is no more than a bill issued by a person, including a freight forwarder, who assumes the primary responsibility of a carrier.[134] Also, it differs from the traditional bill of lading in that it can be issued by a sea carrier or by a carrier of any sort, such as a freight forwarder. Therefore, a combined transport document will normally be in the form of a "received for shipment" bill, since the shipper, according to the modern trading practices, will handle the goods to the contracting party at an inland depot. It has been noted that a "received for shipment" bill of lading which is issued by only the sea carrier can be as a document of title, since the only bill of lading which has been qualified as a document of title, according to *Lickbarrow .v. Mason*, was issued by a sea carrier. A combined transport bill is normally issued in a received for shipment, rather than shipped form, but it may also be issued by either a sea carrier or a carrier of any sort and so, it is important to know whether a combined transport bill can be qualified as a document of title no matter whether it is issued by a sea carrier or a carrier of any sort.[135]

However, it has been pointed out that, the courts can recognise any document as a document of title where it meets certain conditions.[136] First, it should be issued by a bailee who undertakes to deliver the goods to the holder of the document and so the issuer of the

---

[134] See Gaskell, N., (*et al*), *supra* fn. 56 at para. 1. 42.

[135] It was suggested that a combined transport bill of lading is not a document of title, since the presentation of the duly indorsed combined bill for delivery of the goods is no more than a contractual condition, and so the Bills of Lading Act 1855 did not apply to this sort of bill.

[136] See Debattista, C., *Sale of Goods Carried by Sea*, London: Butterworths 1990, chapter 8 and Goode, R. M., *Proprietary and Insolvency in Sales Transactions*, 2nd Edition, London: Sweet & Maxwell 1989, at p. 59 and p. 61.

document should be a bailee who has physical possession of the goods.[137] Issuing a combined transport document by someone other than a sea carrier or in fact any sort of a carrier should not be an obstacle against the recognition of that document as a document of title, since the level of control by the holder of that document would not be affected by the identity of the issuer. Moreover, the issuer of a combined transport document should undertake to take care of the goods through out of the entire transit and he should promise to deliver them to the holder of that document. A combined transport document being in a received for shipment form should not be an obstacle since the bailee accepts responsibility from the moment of the goods are in his custody. The level of the bailee's responsibility in order to qualify the document as a document of title should not be less than the sea carrier's responsibility under the Hague- Visby Rules and so, the bailee would be liable in the case of negligence subject to the well- known exceptions.[138] Secondly, the goods which are the subject matter of the contract should be identified, since passing of constructive possession of the goods is one of the important feature of the document of title which can be transferred from one party to another by only transferring the document of title related to the goods. Thirdly, the right to delivery of the goods should be transferred by endorsement and delivery of the document by mercantile custom. However, a combined transport bill is treated by mercantile practice in the same way as a traditional bill of lading and also it is capable of being transferred from one party to another by delivery and endorsement. Moreover, it is accepted by banks, under art. 26 of UCP 500, for financing the sale transaction in return for a loan.[139]

---

[137] The fact that, the physical possession of the goods might be with the sub- contractor of the bailee, should not make any difference since, it can be justified by the bailee's authority to sub- bail. See Sanson, N., *supra* fn. 130 at p. 8.

[138] See Palmer, N., & McKendrick, E., *supra* fn. 125 at pp. 547, 566. However, the well- known exceptions are found in art. IV 2 (a- q) of the Hague- Visby Rules.

[139] Article 26 of UCP 500 provides that "If a Credit calls for a transport document covering two different modes of transport (multimodal transport), banks will, unless otherwise stipulated in the Credit, accept a document,....."

The definition of document of title, under s. 1 (4) of the Factors Act 1889, seems to accept any document which is "used in the ordinary course of business as proof of the possession or control of goods" and so the common use of a combined transport document as proof of possession or control of goods can facilitate the approval of this document as a document of title, since the recognition of the ocean bill of lading itself as a document of title came from the commercial practices.[140] Furthermore, these commercial practices can be supported by the judgement of Devlin, J., in *Pyrene Co. v. Scindia Navigation Co.,*[141] who concluded that The Hague Rules can be applied to the sea leg where a single contract covers both sea and inland transport. Therefore, the Hague- Visby Rules can be applied to a multimodal transport contract, only in respect of the sea leg, which covers sea transport as well as land transport. These arguments can push the courts to see the importance of the recognition of a custom in international trade and so lead them to accept this document as a document of title. However, Lord Devlin mentioned that for a custom to be a good law, it should be "certain, reasonable and not repugnant".[142] A combined transport document would be certain where it is in a form similar to the traditional bill of lading's and would also be reasonable since, "The law knows that to require the physical delivery of goods whenever they change hands in trade would be unreasonable and recognises the need of merchants for a document that will represent the goods".[143] Moreover, the acceptance of this document by banks under UCP rules would provide more certainty and reasonability for a custom which would recognise this document as a document of title. Thus the absence of this custom would be repugnant since "The function of the commercial law is to

---

[140] See Faber, D., "The Problems Arising from Multimodal Transport", [1996] LMCLQ 503 at 513.
[141] [1954] 2 Q.B. 402 at 415.
[142] See *Kum .v. Wah Tat Bank*, [1971] 1 Lloyd's Rep. 439 at 444.
[143] *Ibid.* at 444.

allow, so far as it can, commercial men to do business in the way in which they want to do it and not to require them to stick to forms that they may think to be out- moded".[144]

The problem with combined bills of lading is not so much their status as documents of title but the question of whether multi- modal documents fall within the scope of COGSA 1992. Carver argues[145] that such documents do not fall within the scope of the 1992 Act. Carver states that "there is the further, and more fundamental, difficulty that the Act gives no comprehensive definition of the expression "bill of lading" while in the English common law this expression has been used to refer only to a document containing or evidencing a contract for carriage of goods *by sea*. The 1992 Act gives no indication of any legislative intention to depart from this common law concept of a bill of lading as a sea carriage contract document".[146] This argument can be countered by reference to s. 1 (1) (a) of the 1992 Act which states that this Act applies to "any bill of lading" and s. 5 (1) (a) defines the carriage contract as "the contract contained in or evidenced by that bill". One could, accordingly, argue that the combined effect of these sections is to make the Act applicable to *any* bill as long as the carriage contract is contained in or evidenced by such bill regardless of whether such carriage contract covers a carriage wholly or partly by sea. However, an acceptance of this counter- argument would entail treating a combined transport bill of lading differently from a combined transport waybill. This is because the Act defines a 'sea waybill' as a document which contains or evidences "a contract of carriage *by sea*".[147] As Carver points out these words "do not in their natural meaning refer to carriage partly by land".[148]

Apart from the issue of title to sue, both legal and practical consequences would flow if combined transport bills were to be recognised as proper bills of lading for the

---

[144] *Ibid.*
[145] See *Carver on Bills of Lading*, *supra* fn. 27 at paras. 8- 071- 8- 073.
[146] See *Carver on Bills of Lading*, *supra* fn. 27 at para. 8- 072
[147] Ship's delivery orders are defined in similar fashion.
[148] See *Carver on Bills of Lading*, *supra* fn. 27 at para. 8- 073.

purposes, including COGSA 1992. At a legal level, there are two issues to be addressed. First, such bills would retain their possessory qualities after the end of the sea carriage and so would remain transferable during the final road carriage. This goes against Carver's argument that a combined transport bill does not fall within the scope of the 1992 Act on the ground that such bill covers only carriage contract *partly* by sea and, consequently, will lose its possessory qualities after the end of the sea carriage. Against this, one could argue that the 1992 Act is applicable to *any* bill as long as the carriage contract is contained or evidenced by such bill regardless of whether such carriage contract covers carriage *wholly* or *partly* by sea. Therefore, such bill will not lose its possessory qualities after the end of the sea carriage. This counter argument can be supported by s. 2 (2) of the 1992 Act "when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates". Therefore, the endorsements and/ or transfers of combined transport bills during the final road carriage would not convert such bills to spent bills governed by s. 2 (2) of the 1992 Act. This is because the reference to the carrier in s. 2 (2) in respect of combined transport bills would be to the carrier who issued such bills rather than only to the sea carrier. Against this background, the solution would be either to allow such an expansion in the period of negotiability or to treat such bill as negotiable only in respect of the sea carriage. This would mean a third party could only deal safely with such bill if it could be sure that the goods were still in the custody of the sea carrier.

Secondly, there will be multiple liability regimes attaching to the contract contained in or evidenced by a combined transport bill, depending on where the goods are lost or damaged. This should not be a reason for denying the status of a document of title to such bill. This is because such problem applies to 'port to port' bills of lading. Therefore, the solution would be the implementation of the door to door provisions of the Draft

Instrument in art. 4 (2) (1), even though these allow for the provisions of a twin- tier liability system where the road leg is subject to the mandatory provisions of an existing convention such as CMR or COTIF. Therefore, the argument that a combined transport bill would only work as a proper bill of lading for all purposes, including COGSA 1992, if the Multimodal Transport Convention 1980 rather than the Hamburg Rules have also be adopted is doubtful. This is because a two- tiered system of liability is not fatal to the recognition of a document as a bill of lading as long as there is continuous documentary cover as in the case of 'received for shipment' bills of lading under the existing law.

At a practical level, there is the question of finding a way as to oblige the final road carrier to deliver only on presentation of the combined transport bill. This can be accomplished by an express term in the agreement between the issuer of the combined transport bill and the road carrier as to the effect which obliges the road carrier to deliver only against the presentation of the combined transport bill. Moreover, the road carrier should only issue a transport document to the combined transport carrier rather than to the current holder of the combined transport bills. Any different practice would allow two different sets of bills in circulation with the risk of both sets of bills end up indorsed to two different people.

2. 6. THE CARGO OWNER'S ABILITY TO SUE THE CARRIER UNDER US LAW

2. 6. 1. THE TERMS OF THE CARRIAGE CONTRACT

Under American law, the terms of the bill of lading are the terms of the carriage contract between the carrier on one hand and both the shipper and the transferee on the other

hand.[149] The appeal of this approach is strengthened by standard forms of the bill of lading which would potentially reduce disputes over the terms of the carriage contract and their interpretation to minimum. However, under English law, the terms of the carriage contract are the terms of the bill of lading only as far as the carrier and the transferee are concerned.[150] In respect of the terms of the carriage contract between the carrier and the shipper, the English approach is totally different and the bill of lading is considered merely as a receipt and at best evidence of the carriage contract. Therefore, as far as the shipper and the carrier are concerned the terms of the carriage contract are the terms of the bill of lading which could be varied by any antecedent agreement.[151] It is arguable that, the English approach might potentially increase disputes over the terms of the carriage contract and their interpretation. But the fairness of this approach has been proven by cases such as *The Ardennes*. It is also arguable that, despite the advantages of the American approach, it does reduce the value of the negotiation between the shipper and the carrier and also strengthens the carrier's power in imposing and changing the terms of the carriage contract for his own benefit. Moreover, the initial carriage contract would be created a long time before the issuance of the bill of lading and so, according to the American approach, the shipper would be bound by the terms of the bill of lading if the loss or damage happened to the goods before the issuance of the bill, in which case the terms on which he delivered the goods would be different from these on which he is suing. In addition, the acceptance of the American approach would enable the shipper to escape the terms of the initial contract to which he is a party where they are less profitable to him.

---

[149] In *Bank of Delaware .v. Oregon Iron Co.*, '*The Delaware'*, [1871] 20 L.Ed. 779 at 783, the Supreme Court held that the contract between the shipper and the carrier is contained in the bill of lading and Clifford J, said that " in so far as [the bill of lading] is evidence of a contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence". For more details about the different rationalisations behind this approach see Bools, M., *The Bill of Lading- A Document of Title to Goods, An Angola- American Comparison*, London and Hong Kong: LLP 1997, chapter 4 at p. 87.

[150] See *Leduc .v. Ward*, [1888] 20 Q.B.D. 747. This approach has been recently approved in *The Heidberg*, [1994] 2 Lloyd's Rep. 287 at 310.

[151] See *The Ardennes*, *supra* fn. 34.

The next question, which is related to the terms of the carriage contract, is on which terms should the relationship between the carrier, as shipowner, and the charterer be governed as a result of transferring the bill of lading to the charterer. Under both American and English law, the bill of lading operates only as a receipt for the goods and as a document of title, but not as varying the contract between the charterer and the shipowner. However, under American law, the bill of lading can be the carriage contract between the charterer and the shipowner by an express intention of the parties to that effect. Therefore, the parties are advised to stipulate that the issuance of a bill of lading would be without prejudice to the charterparty.[152] Transferring the bill of lading to the charterer from a third party, such as an endorsee, might create a problem with respect to the terms of the contract on which the relationship between the charterer and the shipowner should be governed; the charterparty or the bill of lading. It is arguable that, this problem might be solved according to the express intention of the parties to the charterparty. Therefore, transferring the bill to the charterer from a third party would not change the conclusion that their relationship should be governed by the terms of the charterparty, because of the existence of an express intention to that effect. In the absence of such an express intention, the problem would most probably be solved by reference to factors such as those used by English courts in cases such as *The Dunelmia.*[153]

2. 6. 2. TRANSFERRING CONTRACTUAL RIGHTS

The American law on privity of contract differs from its English equivalent in that a third party beneficiary may be granted a right of suit upon a contract to which it is not privy. Under this principle, the consignee of a bill of lading, the buyer, would be able to sue the carrier for the loss of or the damage to its cargo on the ground that the consignor, the

---

[152] Schoenbaum, T., *Admiralty and Maritime Law*, 2nd Ed., Hornbook Series- West Group, chapter 9 at p. 640.

[153] [1970] 1 Q.B. 289. Also, in *Calcutta S.S. Ltd .v. Andrew Weir & Co.*, *supra* fn. 113. For more details about English law see *supra Initial contract of carriage is a charter- party.*

shipper, contracted with the carrier for the consignee's benefit whereby the carrier promise the safe carriage of the cargo to its destination. Accordingly, the consignor as contractual principal would be able to sue the carrier but only recover nominal damages for any breach of the carriage contract since it suffered no loss; while, the consignee, as a beneficiary of the carriage contract, would be able to sue the carrier and recover substantial damages for any breach of the carriage contract.

Nonetheless, American case law is divided on the privity of contract doctrine. One strand of authority, the 'privity' cases, such as *Newth Morris Box Co. v. Pennsylvania R. Co.*,[154] has allowed the consignor, the shipper, as the principal contractual to recover substantial damages for its own loss as well as for others' loss such as the consignee, the buyer. This type of case law was supported by the House of Lords decision in *Dunlop .v. Lambert.*[155] The second strand of authority, the 'either party' cases, has allowed either the consignor, the shipper, or the consignee, the buyer, to sue with a decision in favour of one baring an action by the other.[156] This type of case law has, on the one hand, ignored the principle that the consignor would not be allowed to recover substantial damages, but rather nominal damages, for the consignee's benefit since he suffered no loss. On the other hand, this principle could render the consignee remediless, even in an action for unjust enrichment against the consignor (where possible), where the consignor has become bankrupt. The final strand of authority, the 'ownership' cases,[157] has allowed only the owner or the person with an immediate right to possession to sue and recover substantial damages for any breach of the carriage contract and therefore, this principle is in line with the English law on negligence. This principle is based on the agency doctrine that the

---

[154] 78 A. 2d. 655 (1955).
[155] [1838- 39] 7 ER 824. The House of Lords held that the plaintiff as a shipper could sue the carrier for any breach of the carriage contract and recover substantial damages in respect of the transferee's loss, as exception to the common law rule which allowed only the plaintiff's to recover substantial damages for its own loss.
[156] See *Donut Systems v. Consolidated Ry. Corp.*, 424 N.E. 2d. 824 (1981).
[157] See *Ladex Corp. v. Transports Aeros Nationales*, 476 S. 2d. 763 (1985).

consignor, the shipper, enters the carriage contract as an agent for a disclosed principal, the consignee, the buyer, and so such an agent, the consignor, has no right of suit but rather the disclosed principal, the consignee.

In the light of these uncertainties, legislation was introduce to deal with right of suit of a third party bill of lading, holder, in the form of the Federal Bills of Lading Act 1916, 'The Pomerence Act'. In 1994, after some slight revisions, this was replaced by Ch. 801.

2. 6. 2. 1. Transferring Contractual Rights under Bills of lading

The position of an endorsee of a bill of lading or a holder of a bearer bill under American law, by virtue of Ch. 801 05 (a), is similar to that under COGSA 1992.[158] However, Ch. 801 05 (a) (2) states that "the common carrier issuing the bill becomes obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill the same as if the carrier had issued the bill to that person". The language which is used in Ch. 801 of the American law provides that a right of action against the carrier will be *granted* to the person to whom the bill of lading is negotiated rather than being *transferred* as under s. 2 (1) of 1992 Act.[159] It is arguable that granting rather than transferring the contractual rights to the transferee under the bill of lading would enable the transferee to have two important advantages. First, the contractual rights which are granted to the transferee would not be affected by any factor which might render the agreement between the shipper and the carrier to be either invalid by law, or void or avoidable by

---

[158] Ch. 801 05 (a) replaced s. 31 (b) of Federal Bills of Lading Act 1916 'The Pomerene Act' (FBLA) which was less complicated and states that "A person to whom an order bill has been dully negotiated Acquires thereby:
(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him". However, the previous section was intended to grant the transferee the rights under the bill of lading. So, it is arguable that, the effect of Ch. 801 05 (a) would be the same as to grant the transferee the contractual rights under the bill of lading, since the legislature's intention by enacting the new section was not to alter the law. Furthermore, the Carmack Amendment grants a new cause of action to the holder of the bill and the right of action is linked to "lawful holder" of the bill as in s. 2 (1) of 1992 Act.

[159] Despite the fact that the shipper would not have a cause of action against the carrier unless he is the holder of the bill which would rebut the presumption that the bill of lading has been transferred.

either mistake or misrepresentation on the part of the shipper. Second, the transferee would be not be bound by the shipper's waiver in respect of any breach committed by the carrier, such as deviation,[160] even though the transferee had notice of the breach when he took the bill of lading. However, the holder might still be bound to take up the bill by the terms of the sale contract.[161] Moreover, a transferee of a bill of lading would be in a better situation in cases such as where there was no express contract between the consignor and the shipowner. Accordingly, by virtue of Ch. 801 05 (a) (2), when a bill of lading is negotiated to a third party, a carriage contract recorded in the bill would spring up rather than being transferred from the shipper. In contrast, by virtue of s. 2 (1) of 1992 Act, the carriage contract is transferred to the transferee rather than granted and so the absence of any contractual relationship between the shipper and the carrier would enable the latter to deny the existence of any contractual relationship between himself and the transferee.[162] Therefore, transferring a bill of lading to the transferee under a charterparty would not create the technical problem under Ch. 801 05 (a) as it did under s.2 (1) of 1992 Act,[163] as the contractual rights would be granted on the terms recorded in the bill of lading to the transferee rather than transferred.

Under Ch. 801 05, a transferee would have rights against the carrier where the bill of lading has been negotiated to him. Therefore, a transferee should be a *bona fide*

---

[160] See *Leduc .v. Ward, supra* fn. 151.

[161] *Cremer .v. General Carrier S.A.*, [1974] 1 W.L.R. 341 at 351, where the court accepted the argument that the carrier can not rely upon the terms of the sale contract to which he was not a party.

[162] This is one of the problems which are caused by the language used by s. 2 (1) of 1992 Act. It is arguable that, a brave interpretation, by the English courts, of s. 2 (1) of 1992 Act that the contract which has been mentioned in s. 2 (1) refers not to the initial contract between the carrier and the shipper but to the contract recorded in the bill of lading. Therefore, the contract which would be vested in the transferee is the one contained in the bill, even in the absence of the existence of the initial contract.

However, this theoretical problem also existed under the Bills of Lading Act 1855 and the solution was set out in *obiter dicta* of Lord Atkin in *Hain Steamship Co. Ltd., v. Tate & Lyle, Ltd.*, [1936] 2 All E.R. 597 at 602- 603. He concluded that, the relationship between the consignee and the shipowner would not be on the terms of the charterparty but a new contract would appear to spring up between the ship and the consignee on the terms of the bill of lading. Therefore, it is arguable that, this mechanism can be used by the courts to solve the problem mention above under the 1992 Act.

[163] This technical problem has been solved by judicial explanation in *Rudolph A. Oetker .v. F. A. Internationale Frachtagentor (The Almak)*, [1985] 1 Lloyd's Rep. 557 at 560, where the court held that a new contract "springs up" when the bill of lading is indorsed to the endorsee.

purchaser in possession of the bill with the necessary endorsement. As under the 1992 Act, Ch. 801 05 does not require the value to be given for the bill as a condition for acquiring the contractual rights against the carrier. Giving value for the bill is required, by virtue of Ch. 801 04 (b), only where the bill of lading, at some stage, has been negotiated in breach of duty, or the owner has been deprived of possession of the bill by fraud, accident, mistake, duress, loss, theft, or conversion. In these circumstances, the person to whom the bill of lading is negotiated should give value for the bill, in good faith, and without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion in order to claim rights against the carrier.[164] The above requirements are justified since, under American law, negotiation also cuts off the owner's title to the goods. Therefore, it would be unacceptable if the owner lost his title to the goods where the subsequent transferee had given no value.

However, by virtue of the 1992 Act, a person in possession of the bill of lading would not be considered as a "lawful" holder where the possession of that bill had been acquired by either means of fraud or theft, or where the person to whom the bill had been negotiated or delivered knew that the person who had negotiated or delivered the bill had acquired the possession of the bill by means of fraud or theft. On one hand, the previous lawful holder might not have a cause of action against the carrier since he is not in possession of the bill.[165] On the other hand, the cause of action would not be transferred to next holder because he would not be a lawful holder by virtue of s. 5 (2) of 1992 Act. Therefore, it arguable that, the previous lawful holder's cause of action against the carrier should remain intact as well as his title to the goods. Otherwise, it would enable the

---

[164] The requirement of good faith would prevent thieves and fraudsters from recovering against the carrier, while the requirement of value would prevent an agent from recovering where there is no reason why he should not providing that there is a way to ensure that the damages would find their way to the person who has suffered loss. See Bools, M., *supra* fn. 149, chapter 4 at p. 93.

[165] Unless 'holder' refers to current entitlement to the bill of lading as opposed to physical possession. This can be supported by arguing that the holder without physical possession of the bill would not lose his contractual rights of suit under s. 2 (1) of the 1992 Act, unless s. 2 (5) of that Act operates.

shipowner who had negligently caused the loss to benefit and the court to strive to find another way of imposing liability. Moreover, a good faith purchaser should be considered as a lawful holder, even thought his transferor has neither title to the goods or a right to possess the bill of lading, where the transfer of that bill falls within the Factors Act 1889 which would take effect as if the owner of the goods had authorised the transfer of the bill. Thus, such a good faith purchaser should have a cause of action against the carrier as well as a good title to the goods.[166]

The situation would be more problematic if the transferee of a person had neither title or ability to transfer a good title who also does not fall within the Factors Act 1889 or an agent who has possession of the bill for the purpose of collecting the goods on behalf of the buyer or the seller in cases such as *The Aliakmon.*[167] Such a transferee would be considered as a holder of the bill with a cause of action against the carrier, cutting off the owner's cause of action. However, such a transferee could sue the carrier and recover damages on behalf of the owner, but he has little incentive and the owner can not compel him to do so. However, this problem would not occur under Ch. 801 since the transferee's title to the goods and his cause of action depend on just the one criterion, which is whether the bill of lading has been duly negotiated or not.[168]

---

[166] The good faith purchaser, transferee, would have a cause of action only in circumstances where he would have title to the goods by virtue of one of the *nemo dat* exceptions.

[167] [1986] A.C. 785. Where the buyers had the bill as agent for the seller. It is argued that the concept of possession could be a flexible one and so to allow the agent to have actual possession while the owner of the goods to have constructive possession.

[168] This problem could not appear under s. 1 of the 1855 Act because the right of action against the carrier was linked with the transfer of property. However, the opposite situation could arise where there was a transferee with a title to the goods but without a cause of action. Nevertheless, it is arguable that, this problem might have been solved, if the Law Commissions had considered the idea of linking the cause of action and the transfer of the title to the goods as under American law. See Bools, M., *supra* fn. 149, chapter 4 at p. 94.

2. 6. 2. 2. Transferring Contractual Rights under Non- Negotiable Bills "Sea Waybills"

A non- negotiable bill is defined at Ch. 801 03 (b) as one where "the bill states that the goods are to be delivered to a consignee". Also, the carrier issuing this document must put "non- negotiable" or "not- negotiable" on the face of the bill.[169] A non- negotiable bill is different from a sea waybill in one important aspect, in that it has the capability of being transferred once by delivery and agreement to transfer title to the bill or to the goods represented thereby.[170] On the other hand, a sea waybill is a document incapable of being transferred and it would only confer the contractual rights to the named consignee.

By virtue of Ch. 801 06 (c), the contractual rights under a non- negotiable bill or a straight bill will not be transferred to the transferee, unless the carrier has been notified that a non- negotiable bill has been transferred to him.[171] In contrast, under s. 2 (b) of 1992 Act the contractual rights under a sea waybill will be given to the person to whom delivery is to be made rather than to a named consignee. This is because, the sea waybill is not a transferable document of title, as a non- negotiable bill, and so the shipper is the only person who has the right to redirect the carrier to deliver the goods to some one else other than the named consignee. The right of disposal, under English law, is justified since a sea way bill is not a transferable document. Moreover, this right is given only to the shipper in a limited case and restricted with conditions which should be satisfied before its

---

[169] A non- negotiable bill is well known as a straight bill of lading and its corresponding name in other jurisdictions, such as the UK, is a sea waybill. However, there is no difference, in terms of definition and the carrier's obligation to distinguish this document from an order bill, between Ch. 801 and the Pomerene Act 1916.

[170] The words "express or implied" do not appear in Ch. 801 06 (a), as in the corresponding s. 29 of the Pomerene Act 1916. Nevertheless, it is arguable that the legislature's intention was not to alter the law and the courts might presume the existence of these words.

[171] Giving notice to the carrier is different from the shipper's assignment of his rights, which requires the shipper's co- operation, and from attornment by the carrier that does not require the carrier's assent. See Bools, M., *supra* fn. 149, chapter 4 at p. 97.

implementation.[172] By virtue of Ch. 801 06 (c) (1), the transferee's title to the goods or cause of action can be defeated by a notice to the carrier from the transferor or his purchaser of a later purchase of the goods, or by a notice of garnishment, attachment or execution on the goods by the creditor of the transferor.

The contractual rights acquired by the transferee under a non- negotiable bill, by virtue of Ch. 801 06 (c) (1), are limited since the carrier will only owe him the obligations which are owed by the transferor before the notification. In contrast, by virtue of s. 2 (1) of 1992 Act, the person to whom delivery is to be made, the named consignee, shall have transferred to and vested in him all rights of suit under the carriage contract as if he had been party to that contract.[173] Therefore, it arguable that, the position of the transferee of a non- negotiable bill is better under COGSA 1992 than under Ch. 801 06, since his rights are not limited to what the carrier owed the transferor before the notification. Moreover, the transferee will not need to go down the chain in order to ascertain the transferor's rights.

Bearing the above differences in mind, the named consignee of a sea waybill, under COGSA 1992, is in a better position than the transferee of a non- negotiable bill, under Ch. 801 06,[174] since the named consignee's rights can be ascertained at a glance and according to the terms of his document rather than needing to go down the chain to decide his transferor's rights. Also, under US law the transferee's rights are limited to what the carrier owes his transferor, whereas under English law all rights of suit under the carriage contract would be transferred and vested in him as if he had been a party to that contract. Therefore, he would not be affected by any previous agreement between his transferor and the carrier

---

[172] The condition, which should be satisfied, are, first, the seller must be unpaid as defined by s. 38 (1) of SGA 1979. Secondly, the buyer must be insolvent as explained in s. 61 (4) of SGA 1979. Finally, the goods must be in course of transit as described in s. 45 of SGA 1979.

[173] By virtue of s. 1 (3), the terms of the carriage contract between the carrier and the named consignee would be the terms of the sea waybill, since it is contained or evidenced the carriage contract between the shipper and the carrier.

[174] For opposite point view see Bools, M., *supra* fn. 149, chapter 4 at p. 98.

where the former had waived any breach of contract, such as deviation. In contrast to this under American law the carrier would be unable to avoid liability where this document has been transferred to some one else other than the named person in it.[175] It is arguable that, despite the fact that the sea waybill is a non- transferable document, the named consignee with contractual rights can sue the carrier for the benefit of the person who had suffered loss, by virtue of s. 2 (4) of 1992 Act, where the requirements were satisfied, despite the fact that he had suffered no loss.

2. 6. 2. 3. The Shipper's Rights after Transfer

As has previously been stated, a right of action against the carrier under Ch. 801 will be granted to the person to whom the bill of lading is negotiated rather than being transferred as under s. 2 (1) of 1992 Act. Therefore, the shipper's cause of action, arguably, should not be extinguished. There is, however, no crystal-clear and straight answer to this problem, under Ch. 801. However, the shipper will not be able to sue the carrier unless he has the possession of the bill of lading which would rebut the presumption that the bill has been transferred to someone else. Therefore, it is arguable that, the shipper's entitlement to sue the carrier depends upon his ability to produce evidence that the bill has not been transferred so to give the cause of action to another person, since the cause of action is linked to the bill of lading.[176]

In contrast, by virtue of s. 2 (5) of 1992 Act, the shipper's rights, as an original party, are extinguished where the rights of suit are transferred to the holder of the bill by virtue of s. 2 (1) of 1992 Act. The shipper might need to sue the carrier for his own loss in

---

[175] See Bools, M., *ibid.*

[176] This problem has been considered by the American courts under the Carmack Amendment, which grants a cause of action to the holder of the bill as Ch. 801. However, the majority followed the approach that the shipper's ability to have a cause of action depends on being the holder of the bill. See Bools, M., *ibid.* chapter 4 at p. 100.

cases such as, where he has sold the goods at his risk but parted with the property.[177] Although, the holder of the bill, by virtue of s. 2 (4) of 1992 Act, can recover substantial damages from the carrier for the benefit of the person who had suffered the loss such as the shipper, the holder might not be able to recover substantial damages for the shipper's benefit, in the above case, since the latter might not qualify as a person with an interest or right to the goods according to s. 2 (4) (a) of 1992 Act.[178] Moreover, the shipper might be the only person with a cause of action, but without a right to recover substantial damages for the person who had suffered loss in cases such as where the bill had never been transferred so as to give the latter a cause of action according to s. 2 (1) of 1992 Act.[179] However, the shipper as an original party can still sue for the benefit of a third party who had suffered loss according to the rule of *Dunlop .v. Lambert* as an exception to the common law rules, provided that his original contract is not contained in or evidenced by the charter- party. The shipper's ability to recover substantial damages was restricted by the decision in *The Albazero*. But, a separate exception was recognised *in The Sanix Ace* whereby the shipper may recover substantial damages in contract or tort provided that he still the owner of the goods at the time of breach, notwithstanding that risk has passed to a third party.

There is no corresponding section to s. 2 (4) of 1992 Act in Ch. 801, but it is arguable that the transferee's ability to recover damages for loss suffered by another person can be implied on the ground of Ch. 801 06 (a).[180] This provides that a non- negotiable bill can be transferred to the transferee with intention to transfer only title to the bill but not to the goods. Thus, the transfer of a non- negotiable bill to the agent of the transferee for the

---

[177] For the other situations see *infra* fn. 228.
[178] For more details about inability of the holder of the bill to sue for the shipper's benefits in such cases see *supra Recovery of third party losses*.
[179] Also, where the bill has been lost during transmission and the transferee never acquired possession of it or where bill has been transferred without the requisite endorsement.
[180] Bools, M., *supra* fn. 149, chapter 4 at p. 105.

purpose of collecting the goods would enable him to sue the carrier and recover substantial damages, for the benefit of his principal, if he has notified the carrier of that transfer. Otherwise, it would be pointless to give him a cause of action but without the right to recover substantial damages. Therefore, there is no reason for the transferee of a negotiable bill of lading not to have a right of recovering substantial damages as the transferee of a non- negotiable bill.[181] Recovery of substantial damages by the shipper for the benefit of a person who had suffered loss, but without a cause of action, is also not clear under Ch. 801. However, under American law, the shipper can be a holder of the bill of lading and also the terms of the carriage contract between the carrier and him would be on the terms of the bill of lading. Therefore, the shipper, as a holder of the bill of lading, would be able to recover substantial damages for his own loss as well as another's loss.[182]

According to COGSA 1992, the holder of the bill of lading would be able to recover substantial damages for his own loss as well as another person's loss, but the shipper would only be able to recover substantial damages for his own loss and nominal damages for the other's loss. In contrast, under American law, the holder of the bill would be able to recover substantial damages by virtue of being a holder of the bill whether he is a shipper or not.

2. 6. 3. FREIGHT FORWARDER' BILLS OF LADING

Freight forwarders have often attempted to claim the status of carriers in order to have the benefits afforded by COGSA, which apply statutorily to the "carrier". Not all freight forwarders can claim the status of carriers and so American courts in determining whether freight forwarders can be considered as carriers have distinguished between two types of freight forwarders. On the one hand, there are those freight forwarders who "locate and

---

[181] This conclusion is supported by the courts' approach to this problem under Carmack Amendment which allows the holder of the bill of lading to sue for any loss or damage to the goods. See Bools, M., *ibid.*

[182] The shipper, under COGSA 1992, cannot be qualified as a lawful holder of the bill, since it would undermined the intention of solving the privity problem.

reserve space, prepare bills of lading, arrange for cargo to be picked up and delivered to the pier and do other paper work concerned with exporting, They collect fees from exporters and sometimes also brokerage commissions from ship owners".[183] On the other hand, there are those freight forwarders (Non- Vessel Operating Common Carrier NVOCCs) who "consolidate cargoes belonging to may different shippers and charter a ship to carry them".[184]

The Shipping Act 1984 was amended by the Ocean Shipping Reform Act 1998 and was effective May 1, 1999; the regulations were amended by the Federal Maritime Commission and were effective the same date. The Federal Maritime Commission, by virtue of s. 515 (2) (o), defines the "ocean transportation intermediary" as "an ocean freight forwarder or a non- vessel- operating common carrier". On the one hand, by virtue of s. 515 (2) (o) (1) an ocean freight forwarder is "a person that- (i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shipper; and (ii) processes the documentation or performs related activities incident to those shipments". On the other hand, by virtue of s. 515 (2) (o) (2), the non- vessel- operating common carrier is "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier". Accordingly, the Federal Maritime Commission differentiates between two types of freight forwarders and therefore the non- vessel- operating common carrier, by virtue of s. 515 (2) (I), will provide services, such as purchasing services from ocean common carrier and offering them for resale to other persons; entering into affreightment agreement with underlying shippers and issuing bills of lading or equivalent documents. Therefore, one could argue that the non- vessel- operating common carrier, while providing such services, is acting as

---

[183] See Schoenbaum, Thomas J., *supra* fn. 152, fn. 1 in p. 524.
[184] *Ibid.*

a principal in both of its relationships with the ocean common carrier, as the shipper, and with the cargo owner, as the common carrier. The cargo owner, as the shipper, has only a direct contractual relationship with the NVOCC, but not with the ocean common carrier or other carriers. On the other hand, the ocean freight forwarder, while providing the services mentioned in s. 515 (2) (o) (1) (i & ii) & (2) (i), is merely acting as the shipper's agent and, therefore, the cargo owner, through its agent, the ocean freight forwarder, has a direct contractual relationship with the ocean common carrier.

The Court of Appeals for the First Circuit in *Fireman' Fund American Insurance Cos. v. Puerto Rican Forwarding Co.*,[185] has observed that "The important point about an NVOCC is that although it may not own the ships on which its customers' goods are physically transported, it nevertheless is the 'carrier' responsible for the through transportation of such goods, including the water portion. As the carrier, an NVOCC issues its own bill of lading to each small shipper that employs its services, describing the goods for whose transportation it will be held responsible". The court in *Zima Corp. v. M. V, Roman Pazinski*,[186] have applied a four- part test to decide whether a party acted as a freight forwarder or as an NVOCC "(1) the way the party's obligation is expressed in documents pertaining to the agreement .....; (2) the history of dealings between the parties ....; (3) issuance of a bill of lading ....; (4) how the party made its profit".

The court in *M. Prusman Ltd., and Sahar Insurance Co. Ltd. v. The M/V Nathanel*,[187] concluded that the NVOCC should be included within the definition of "carrier" under COGSA as the party who enters into a carriage contract with the shipper and holds otherwise itself out to provide transportation of cargo for hire by water. Also, it concluded that the bill of lading is the carriage contract under s. 1301 (b) of COGSA and so it held that "It is not in dispute that Javelin [NVOCC] issued two bills of lading for the

---

[185] 492 F. 2d 1294 at 1295 (1st Cir. 1974).
[186] 493 F. Supp. 268 at 273 (S.D.N.Y. 1980).
[187] 670 F. Supp. 1141 at 1143, 1988 AMC 296 (S.D.N.Y. 1987).

cargo and that it arranged for the transportation of the cargo by water to Israel. Thus, it is a common carrier for the purpose of determining its liability under COGSA".[188]

The court in *National Customs Brokers & Forwarders Association of America v. United States of America*,[189] described the role of NVOCC as follow "NVOCCs, typically, are small firms that do not own or operate transportation equipment, but instead lease facilities and services from others, and have a small workforce of primarily managerial and clerical employees. NVOCCs consolidate and load small shipments from multiple shippers into a single large reusable metal container obtained from a steamship company, and ship the container by vessel under a single bill of lading in the NVOCC's name; NVOCCs charge rates within the margin between the steamship line's (the vessel operator's) rates applicable to loose, 'break bulk' shipments, and special lower rates applicable to consolidate container loads. The Shipping Act 1984 recognized the NVOCC as a legal entity with the status of 'a shipper in its relationship with an ocean common carrier' but the status of a carrier in its relationship with exporter customers.[190] An NVOCC assumes common carrier responsibilities for the transportation even though it 'does not operate the vessels by which the ocean transportation is provided'.[191] The NVOCC is compensated only by the shipper".

Moreover, The Court of Appeals for the Eleventh Circuit in *Itel Container Corp. v. M/V "Titan Scan"*,[192] defined the NVOCC as "an entity that contracts with a shipper as carrier, but then enters into a separate agreement with a vessel owner or charterer for the actual carriage of the shipper's cargo". The NVOCC, Candyline, issued a bill of lading to

---

[188] See *Federal Insurance Co. v. Mitsui O.S.K. Lines Ltd., and Summers North- West Express and Others*, 2001 U.S Dist. LEXIS 18209 at [26] (N.D.Ill July 17, 2001), citing *M. Prusman Ltd., and Sahar Insurance Co. Ltd. v. The M/V Nathanel*, held that NVOCC which issues a bill of lading for carriage of goods, although it does not own or operate the physical means by which goods are transported, is a carrier within the meaning of COGSA.

[189] 883 F. 2d 93 at 101, 1991 AMC 302 (D.C. Cir. 1989).

[190] 46 U.S C. App. section 1702 (17) of the Shipping Act 1984.

[191] *Ibid.*

[192] 139 F. 3d 1450 at 1451, 1998 AMC 1965 (11th Cir. 1998).

the shipper, Itel, while Mammoet, the manager of the vessel, issued a bill of lading to the NVOCC for the actual carriage of the containers. Accordingly, the court held that "We agree with the district court's conclusion that Itel/ Candyline and Candyline/ Mammoet contracts must be evaluated as two separate transactions. The evidence is undisputed that Itel and Mammoet had no communication during the negotiation of the respective contracts of carriage".

However, the Court of Appeals for the Second Circuit in *Prima U.S. Inc. v. Panalpina Inc.*,[193] observed that the function of an NVOCC is to consolidate cargo from numerous shippers into large groups for shipment by an ocean carrier and- as opposed to the actual ocean carrier transporting the cargo- it issues a bill of lading to each shipper. Accordingly, if anything happens to the goods during the voyage the NVOCC is liable to the shipper because of the bill of lading that it issued. The court, then, held that Panalpina as a freight forwarder neither issued a bill of lading nor consolidated the cargo but simply was hired to arrange for the transportation of the goods, therefore, it was not a carrier so as to be liable for the damaged cargo caused by the stevedore's negligent actions. As regard Panalpina's agreement with Westinghouse, the shipper, which stated that "shipment [would] receive door to door our close care and supervision", the court held that "However, because of the well settled legal distinction between forwarders and carriers, that statement- mere puffing- cannot transform Panalpina into a carrier, and bestow liability upon".[194] The court, however, held that "Of course a party that calls itself a freight forwarder might in fact be performing the functions of a carrier, in which case function would govern over form. But the burden of demonstrating any deviation from what freight forwarders normally do in the maritime context must rest, and heavily so, on the party who

---

[193] 223 F. 3d 126 at 129, 2000 AMC 2897 (2d Cir. 2000).
[194] *Ibid.*

would show such deviation".[195] Therefore, it held that, as a general rule, a freight forwarder is not a COGSA carrier.

The Court of Appeals for the Fifth Circuit in S*abah Shipyard Sdn Bhd v. M/V Harbel Tapper Ltd., Industrial Maritime Carriers (Bahamas) and Others*,[196] held that to determine whether a party is a COGSA carrier one must follow COGSA's plain language, focusing on whether the party entered into a carriage contract with the shipper. The facts are that Sabah contracted with IMB for transporting Sabah's cargo from Houston, Texas to Labuan, Malaysia. IMB issued a bill of lading to Sabah's agent, which provided for shipment aboard the M/ V Harbel Tapper owned by L & C. The bill listed Houston as the "port of loading", Singapore as the "port of discharge", and Labuan as the "place of delivery by on- carrier".[197] The court, then, considered the interpretation of the "carrier" and the "contract of carriage" under COGSA. Section 1301 (a) of COGSA defines the term "carrier" so as to "include[s] the owner or the charterer who enters into a contract of carriage with a shipper". Also, s. 1301 (b) of COGSA defines the carriage contract as that "covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea". Based on both the facts and its interpretation of the respective sections of COGSA and the plain language of COGSA, the court held that IMB and Intermarine entered into a contract of carriage with Sabah. They agreed to carry Sabah's goods and they issued a bill of lading and so they are carriers within the provisions of COGSA.[198]

---

[195] *Ibid.* at 130 fn. 1.
[196] 178 F. 3d 400, 2000 AMC 163 (5th Cir. 1999).
[197] *Ibid.* at 403.
[198] *Ibid.* at 405. The Court of Appeals for the Fifth Circuit did not address the distinction between a freight forwarder and freight forwarder- carrier and nor applied the four- part test set forth in *Zima Corp. v. M. V, Roman Pazinski*, nonetheless, it held that applying the four- part would only "bolster our conclusion that IMB and its agent Intermarine were carriers under COGSA". *Ibid.* at 405 n. 2.

The Court of Appeals for the Eleventh Circuit in *James N. Kirby v. Norfolk Southern Railway*,[199] considered the issue of whether the sub- contractor, Norfolk, of the ocean carrier, Hamburg- Sud, was protected by the Himalaya Clause under the ocean carrier's bill of lading against Kirby's claim. Kirby entered into a carriage contract with ICC, freight forwarder, to carry the goods from Sydney- Australia to Savannah- USA then to Huntsville-the final destination. ICC entered into a carriage of contract with Hamburg-Sud, ocean carrier, to transport the goods from the port of loading to the final destination. Both ICC and Hamburg- Sud issued bills of lading. ICC's bill named Kirby as the shipper, and Hamburg's named ICC as the shipper. Both bills of lading included Himalaya Clauses that gave the beneficiaries of these clauses the right, amongst others, to rely on the USA COGSA package limitation. The court distinguished between a freight forwarder and a freight forwarder- carrier and held that "A freight forwarder acts as a principal when it takes on the role of carrier itself, and issues its own bill of lading to the cargo owner listing the cargo owner as the shipper and itself as the carrier. In this latter scenario, the cargo owner pays the forwarder, not the ocean carrier. The forwarder then subcontracts out to an ocean carrier its responsibilities under its bill to carry the goods. The ocean carrier issues to the forwarder a second bill of lading that lists the forwarder as the shipper, that is, as a principal".[200]

Applying this definition to the facts of the case, the court held ICC was acting as a principal and not as Kirby's agent. This was evident, first, from the structure of the transaction and, second, from the issuance of two different bills of lading. If ICC had been acting as Kirby's agent, there would have been only one bill of lading, issued by Hamburg-Sud to Kirby and listing Kirby as the shipper. Instead, ICC issued a bill of lading to Kirby, and then ICC, in turn, was issued a bill by Hamburg- Sud. The Hamburg- Sud bill listed

---

[199] 300 F. 3d 1300, 2002 AMC 2113 (11th Cir. 2002).
[200] *Ibid.* at 1305.

ICC, not Kirby, as the shipper, thereby evidencing that Hamburg- Sud was contracting with ICC as a principal and not as an agent for Kirby.

The court supported its conclusion by reference to the language of ICC's bill of lading, such as ICC's undertaking to "perform.... the entire transport" or "in [its] own name to procure the performance of the entire transport" and ICC's responsibility for "the acts or omissions of its servants or agents", which indicated that ICC was acting as a principal rather than as Kirby's agent.[201] Also, ICC's form of the bill of lading as a FBL,[202] according to the drafters' intention, indicated that ICC, by using this form, had established itself as a carrier with carrier liability. Coupled with the fact that ICC and Kirby chose that form, this buttressed the conclusion that ICC was acting as a principal rather than an agent.[203] Therefore, the court concluded that only the Hamburg - Sud bill of lading would protect Norfolk, unless ICC had acted as Kirby's agent, in hiring Hamburg- Sud, which it had not.

Nonetheless, American courts, in some cases, have oddly treated the NVOCC as the shipper's agent in entering into the carriage contract with the ocean carrier evidenced by the ocean carrier's bill of lading, most recently, the Court of Appeals for the Ninth Circuit in *Kukje Hwajae Insurance Co., Ltd. v. The "M/V Hyundai Liberty" and Glory Express, Inc.*[204] Doosan contracted with Glory Express, an NVOCC, to ship a lathe from Korea to the United States. The NVOCC issued three bills of lading identifying Doosan as the shipper and the "Hyundai Liberty" as the "Exporting Carrier". The NVOCC contracted with the ocean carrier who issued a bill of lading, contained a forum selection clause, identifying the NVOCC's agent as the shipper. The plaintiff, who was a subrogating insurer who had paid the shipper's claim, sued the ocean carrier in tort, claiming that the

---

[201] *Ibid.*
[202] "FBL" is a short name for "FIATA" which stands for International Federation of Freight Forwarders Associations.
[203] See *supra* fn. 199 at 1306.
[204] 294 F. 3d 1171, 2002 AMC 1598 (9th Cir. June 26, 2002).

forum selection clause did not apply to its claim in tort, since neither it nor the shipper were parties to the ocean carrier's bill of lading.

The court held that the forum selection clause could be enforced against the plaintiff because the commercial role of an NVOCC, as well as the facts of the case, led to conclusion that the NVOCC was acting as Doosan's agent when it accepted the ocean carrier's bill of lading.[205] As a result, the plaintiff, as Doosan's subrogee, was bound by the bill of lading including the forum clause. As for the commercial role of an NVOCC, the court, citing the federal statute which defines an NVOCC, by virtue of s. 1702 (17) (b) of 46 U.S.C. app., as "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier", held that "Both commentators and courts have recognized that an NVOCC generally acts as the agent of the cargo owner/ shipper when it contracts with the ocean carrier to ship the cargo owner's goods".[206] One could argue that it is true that the NVOCC is the shipper with its relationship with the ocean carrier, but as a principal rather than as the cargo owner's agent. Therefore, the court should have quoted s. 1702 (17) (a) of 46 U.S.C. app., which defines "ocean freight forwarder" in contrast to the NVOCC's definition.

The court quoted with approval a paragraph in an article by Martin Davies,[207] which stated that "A non- vessel operating common carrier, or NVOCC, contracts with its customers as principal, agreeing to transport their goods on a voyage that includes an ocean leg. An NVOCC commonly issues bills of lading to its customers in its own name, even though it does not operate the ship that will carry the goods on the ocean voyage. It buys space on the carrying ship like any other customer, receiving a bill of lading from the

---

[205] *Ibid.* at 1175.
[206] *Ibid.* at 1176.
[207] Martin Davies "In Defense of Unpopular Virtues: Personification and Ratification" (2000) 75 Tul. L. Rev. 337 at 396- 396.

owner or charterer of that ship when the goods are loaded on board. It commonly consolidates goods from several different shippers into a single container, receiving a bill of lading from the ocean carrier in relation to the container as a whole. The NVOCC is not authorised by the owner or master of the carrying ship to issue bills of lading that will bind the ship; indeed, the ocean carrier may have no idea that the party to whom it issues its bill of lading us in fact an NVOCC that has issued bills of lading itself. The relationship between ocean carrier and NVOCC is therefore not one of agency, but is a contractual one embodied in the ocean carrier's bill of lading, under which the NVOCC is the shipper. The NVOCC does not contract with the owners of the goods as agent for the ship. *Quite the reverse, it contracts with the ocean carrier as agent for the owners of the goods*". One could argue that it is, also, true that the NVOCC does not contract with the owners of the goods as agent for the ship, the issue should be the capacity in which the NVOCC contracted with the ocean carrier. Did it contract as a principal or only as the cargo owner's agent?

Also, the court cited with approval, the Court of Appeals for the Second Circuit in *Insurance Company of North America v. S/S American Argosy*,[208] in which it held that "With respect to the vessel and her owner, however, the NVOCC is an agent of the shipper".[209] It also cited the decision of the Court of Appeals for the Eleventh Circuit *Insurance Company of North America v. M/V Ocean Lynx*,[210] which held that "Edusystems [the shipper] may treat Mar [NVOCC] as a common carrier for the purpose of COGSA, but underlying carriers such as Bottacchi [the charterer] treat Mar as Edusystems' agent".[211] As a result, the court in *Kukje Hwajae Insurance Co., Ltd. v. The "M/V Hyundai Liberty"*

---

[208] 732 F. 2d 299 at 301, 1984 AMC 1547 (2d Cir. 1984).
[209] *Ibid.*
[210] 901 F. 2d 934, 1991 AMC 64 (11th Cir. 1990).
[211] *Ibid.* at 936 fn. 2. See, also, the court in *Orion Ins. Co. v. M/V "Humacao"*, 581 F. Supp. 575 at 577- 578 fn. 4 (S.D.N.Y 1994), which concluded that an NVOCC acts as the agent of the cargo owner when it agrees to the terms of the bill of lading issued by the shipowner.

and Glory Express, Inc.,[212] held that "Nothing in the record suggests that the relationship between Doosan and Glory Express deviated from that commercial norm. To the contrary, the record shows that Doosan intended Glory Express to act as its agent for the purpose of shipping the lathe". Therefore, the forum selection clause was binding on the plaintiff; the action in tort was stayed.

In conclusion, one could argue that the court decisions in the these cases do not reflect the commercial role of the NVOCC, since they do not analyse the commercial practices of NVOCC's at length. Therefore, they are suspect as a basis for generalisation. This is because the decisions in these cases would subject the cargo owners to direct actions by the ocean carrier when they have never dealt with that party or received its bill of lading. The fact that the American courts have allowed a freight forwarder, a NVOCC, to qualify as a common carrier, so as to take the benefits furnished by COGSA makes it arguable that the freight forwarder's bill of lading, if not as a traditional bill of lading issued by an ocean carrier or charterer, would qualify as "any similar document of title, insofar as such document relates to the carriage of goods by sea" under s. 1301 (b) of COGSA. The Pomerene Act, by virtue of Ch. 801 02; titled as Application, "applies to a bill of lading when the bill of lading is issued by a common carrier" and so, since, the freight forwarder can be consider as a common carrier under COGSA, its bill of lading would be considered as a bill of lading included by the provisions of the Pomerene Act. If such conclusion is accepted, it would reduce, if not demolish, the cargo owner's need to sue the freight forwarder under the general maritime law, such as an action in negligence. If not, one could argue that this conclusion might be accepted, at least, in relation to freight forwarder's bill of lading covering only carriage of goods by sea under as a traditional through bill of lading. This is because COGSA, by virtue of s. 1301 (b), is applicable to

---

[212] See *supra* fn. 204 at 1176.

"any similar document of title insofar as such document relates to the carriage of goods by sea". A traditional through bill of lading is, normally, issued to cover carriage of goods by sea by two vessels or more. Because the provisions of COGSA are only applicable to a limited period of time, "tackle to tackle", freight forwarders should include in their bills of lading a Clause Paramount which has the effect of extending the application of COGSA's provisions beyond that period.

As has been mentioned above, a freight forwarder acting as an agent is a person who assumes no responsibility for the transportation of the goods and limits its role to arrange for the transportation of the goods and other incidental services. Such a freight forwarder neither issues a bill of lading nor consolidates the goods and it will only be liable for the loss of or the damage of the goods caused by it own negligence, including negligence in choosing a carrier.[213] The Court of Appeals for the Second Circuit in *Prima U.S. Inc. v. Panalpina Inc.*,[214] held that Panalpina clearly acted reasonably in hiring CSM as a stevedore on behalf of Westinghouse, hence CSM was the designated official Port of Genoa stevedore. Therefore, it had fulfilled its duties as freight forwarder and it was not liable to Westinghouse for CSM's negligent actions. The issue before the Court of Appeal for the Eleventh Circuit in *NSC Saudi Arabia v. Omni Lines, Inc.*,[215] was whether Omni Lines must be made to pay twice or whether NSCSA is not paid at all. The facts, put simply, are that NSCSA transported the goods as arranged by Exchange, and Omni Lines paid Exchange when billed but Exchange did not pay NSCSA. The court held that "We cannot, however, say as a matter of law that NSCSA has or has not released Omni from its duty to pay. The use of the words 'freight prepaid' appears towards release, as does the fact that NSCSA focused its initial collection efforts at Exchange. Nevertheless, both of these indications were present in *Strachan*, and the Fifth Circuit found that the shipper had not

---

[213] See *Zima Corp. v. M. V, Roman Pazinski*, 493 F. Supp. 268 at 274 (S.D.N.Y. 1980).
[214] See *supra* fn. 193 at 130.
[215] 106 F. 3d 1544, 1997 AMC 1708 (11th Cir. 1997).

been released. Weighing against release, NSCSA claims that local custom views 'freight prepaid' as an extension of credit to the shipper. We also note that the bill of lading itself does not favour finding release".[216]

On the other hand, a freight forwarder acting as a carrier, an NVOCC, is a person who contracts to deliver the goods to their destination and assumes responsibility for the transportation of the goods as a common carrier. Such a freight forwarder issues a bill of lading and consolidates the goods and it will be liable for the loss of or the damage of the goods, whether the fault or other basis of liability for damage lies with such forwarder or with the underlying carrier actually transporting the goods.[217] Accordingly, a freight forwarder acting as a carrier will be considered as a common carrier so as to take the benefits furnished by COGSA in any claim by the cargo owner.[218] A freight forwarder's bill of lading normally contains a Period of Responsibility Clause and a Paramount Clause.

2. 7. TRANSFER OF RIGHTS OF SUIT UNDER THE DRAFT INSTRUMENT

The Draft Instrument contains specific provisions dealing with the transfer of rights and the rights of suit which are not currently governed by any international convention but rather governed by diverse national laws. Under English law, these issues are governed by the provisions of COGSA 1992. Some definitions should be considered before dealing with the specific provisions relating to the transfer of rights and the rights of suit. The Draft Instrument, by virtue of art. 1 (12), defines the 'holder' as

> "a person that (a) is for the time being in possession of a negotiable transport document or has the exclusive [access to] [control of] a negotiable electronic record, and (b) either: (i) if the document is an order

---

[216] *Ibid.* at 1547. The court decision was reversed and remanded for further proceedings consistent with this opinion.
[217] See *Zima Corp. v. M. V, Roman Pazinski*, *supra* fn. 213 at 274.
[218] See *Itel Container Corp. v. M/V "Titan Scan"*, *supra* fn. 192 at 1451; *Sabah Shipyard Sdn Bhd v. M/V Harbel Tapper Ltd., Industrial Maritime Carriers (Bahamas) and Others*, *supra* fn. 197; *James N. Kirby v. Norfolk Southern Railway*, *supra* fn. 199 and *Federal Insurance Co. v. Mitsui O.S.K. Lines Ltd., and Summers North- West Express and Others*, *supra* fn. 188 at [26].

> document, is identified in it as the shipper or the consignee, or is the person to whom the document is dully endorsed, or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof, or (iii) if a negotiable record is used, is pursuant to article 2. 4 able to demonstrate that it has [access to] [control of] such record".

Accordingly, a shipper, a consignee and intermediate holder are included by this definition. An agent of any of these persons acting in its own name and in possession of a negotiable transport document or has an exclusive access to or control of electronic record can be qualified as a holder. The agent, by virtue of art. 13 (1) (iii) of the Draft Instrument, acquires the rights of suit against the carrier or a performing party and so he can sue the carrier or the performing party for the benefit of his principal by virtue of art. 13 (2). However, art. 13 (3) provides one advantage over s. 2 (4) of COGSA 1992, by allowing the claimant who suffers loss or damage in consequence of a breach of the carriage contract, but without being the holder, to sue the carrier or the performing party directly, provided that he proves that it was he, and not the holder, who suffered such loss or damage. This avenue is also available to the shipper or the seller in the case of an out- turn sale where the risk remains with the seller or in the case of the seller's losses in consequence of a breach of the contract which are not associated with the passing of risk such as loss caused by delay in loading.

As to the requirement in COGSA 1992 that the holder of a negotiable transport document should be a lawful holder in good faith, this was not considered by the Draft Instrument. This is because

> "Using the term 'lawful' without specifying what is meant by 'lawful' possession could, however, invite reference to national law, thus undermining uniformity. In any event, paragraph (b) (i) largely addressed the underlying concern for order documents. For bearer documents, it was thought that there is no real problem in practice that needs to be addressed here. If a practical problem did exist, it would not concern bearer documents in a wrongdoer's hands (a problem for which other remedies exist) but documents in the hands of a good faith purchaser who claims through a wrongdoer. It is thought that such a good faith

> purchaser deserve protection, and that those who choose to use bearer documents should recognise such risks".[219]

In contrast, one could argue that the failure to address the issue of lawful possession would result in its being regulated by national laws and thus undermining uniformity. Also, specifying what is meant by lawful possession would not expand the scope of the draft instrument since it contains provisions dealing with issues were not governed by any international conventions such as the rights of suit. Moreover, it is likely, under English law, that a *bona fide* holder of a bearer negotiable transport document and a purchaser in good faith should have a cause of action against the carrier or the performing party where the transfer of this document falls within the Factors Act 1889, even if his transferor had neither title to the goods nor right to possession of the negotiable transport document. This is because the transfer of the negotiable transport document would take effect as if the owner had authorised the transaction and so the transferee would have title to the goods as well as a cause of action.[220]

Article 1 (20), defines 'transport document' as "a document issued pursuant to a contract of carriage by a carrier or performing party that (a) evidences a carrier's or performing party's receipt of goods under a contract of carriage, or (b) evidences or contains a contract of carriage, or both". Also, art. 1 (14) of the Draft Instrument defines 'negotiable transport document' as "a transport document which indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognising as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "non- negotiable" or "not negotiable"". Accordingly, a negotiable combined

---

[219] See UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc. A/CN.9/WG.III/WP.21, (15- 26 April 2002), (Hereinafter U.N. Doc. A/CN.9/WG.III/WP.21) para. 8. The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

[220] However, the issue of lawful holder in good faith was considered under COGSA 1992, for more detail see *supra Being a Lawful Holder of a Bill of Lading in 'Good Faith'*.

transport document would probably be considered as a negotiable transport document under the Draft Instrument. This is because art. 1 (5) defines the carriage contract as "a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another". Therefore, this document is a negotiable transport document as long as the carrier undertakes to carry the goods partly by sea from one place to another. This conclusion is also supported by the fact that this document is essentially no different from a charterer's bill of lading on the ground that art. 1 (1), defines the carrier as "a person that enters into a contract of carriage with a shipper" and so to include a non- sea carrier. Moreover, through bills of lading as well as freight forwarder bills would, probably, be included by the definition of a negotiable transport document on the same ground as combined transport documents. The application of the provisions of COGSA 1992 to these documents depends on qualifying them as documents of title.[221] However, by virtue of art. 3. 3. 1, charter- parties are not subject to the provisions of the Draft Instrument.[222]

Article 13 (1) provides that

> "Without prejudice to article 13. 2 and 13. 3, rights under the contract of carriage may be asserted against the carrier or a performing party only by: (i) the shipper, (ii) the consignee, (iii) any third party to which the shipper or the consignee has assigned its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage, (iv) any third party that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer. in case of any passing of rights of suit through assignment or subrogation as referred to above, the carrier and the performing party are entitles to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this instrument".

In general, art. 13 (1) is applicable to any carriage contract whether or not a transport document or an electronic record has been issued. It is, also, applicable to any transport

---

[221] For more detail see *supra* sub- title 2. 5. in chapter 2.
[222] This is also the case under the Hamburg Rules, by virtue of art. 2 (3).

document or any electronic record regardless of their nature as being negotiable or non-negotiable. Therefore, only the contracting shipper and the consignee would assert the rights of suit against the carrier or the performing party, provided that they suffered loss or damage in consequence of a breach of the carriage contract. Moreover, in general, a third party, such as the cargo owner who has suffered loss or damage in consequence of a breach of the carriage contract, must either acquire the rights of suit from the contracting shipper or the consignee, or acquire the rights of suit against the carrier or the performing party outside the carriage contract. The distinction between 'transferring' and 'granting' is perhaps most significant when one deals with the initial contract containing terms other than those set out in the transport document or the initial contract being void or voidable. Article 13 (1) refers to third party rights to sue on 'contract of carriage' but it says nothing about what the position is if that contract is void or voidable. According to shipping practice, a carriage contract will normally be contained or evidenced by a transport document, such as a bill of lading. Therefore, if the carriage contract is covered by a transport document as defined by art. 1 (20) (b) "evidences or contains a contract of carriage", the terms of the carriage contract, between the carrier or the performing party and the third party, would be those contained or evidenced by such transport document.[223]

However, art. 13 (2) provides that

> "In the event that a negotiable transport document or negotiable electronic record is issued, the holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, without having to prove that it itself has suffered loss or damage. If such holder did not suffer the loss or damage itself, it is be deemed to act on behalf of the party that suffered such loss or damage".

---

[223] See UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc. A/CN.9/WG.III/WP.21, (15- 26 April 2002), (Hereinafter U.N. Doc. A/CN.9/WG.III/WP.21) at para. 23. The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

By virtue of this provision, a party who falls outside the four categories in art. 13 (1) will still be able to sue on the contract of carriage. To do so they must be the holder of a 'negotiable transport instrument'. A 'holder' is defined in art. 1 (12) in similar terms as adopted by s. 5 (2) (b) and (c) of the 1992 Act. A 'negotiable transport document' is defined in art. 1 (14) as a 'transport document that indicates by wording such as "to order" or "negotiable" or other appropriate wording recognised as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly state as being "non-negotiable" or "not negotiable"'. This wording is probably broad enough to cover bills of lading whose status is still doubtful under COGSA 1992, such as combined transport and freight forwarder bills.

Article 13 (2) also entitles the holder of a negotiable transport document or a negotiable electronic record to assert rights of suit against the carrier or a performing party for the benefit of a third party who suffered loss or damage in consequence of a breach of the carriage contract without proving that he himself suffered such loss or damage. In this case, the holder of a negotiable transport document or the transferee of a negotiable electronic record would be deemed to act on behalf of the third party that suffered such loss or damage. The effect of art. 13 (2) of the Draft Instrument is to replicate s. 2 (4) of COGSA 1992. However, art. 13 (2) may be more advantageous than s. 2 (4) of the 1992 Act to a third party on the ground that the holder's of the bill of lading ability to sue for the benefit of a third party under the Act is restricted by the words "with any interest or right in relation to goods to which the document related". These words may not be sufficient to cover a third party who has suffered loss or damage merely because the goods were at his risk. In contrast, the holder of a negotiable transports document or the transferee of a

negotiable electronic record, by virtue of art. 13 (2) would be able to sue the carrier or the performing party for the benefit of such a third party.

There is also the point that s. 2 (4) of the 1992 Act provides no machinery for the person who had suffered loss or damage to compel the holder of the bill of lading to exercise those rights. In contrast, art. 13 (3) provides that "In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is one of the persons referred to in article 13. 1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage". Therefore, the contracting shipper, the consignee and their assigns, without being the holder of a negotiable transport document or a negotiable electronic record, could assert rights of suits against the carrier or the performing party, provided that they suffered loss or damage in consequence of a breach of the carriage contract and that the holder did not suffer such loss or damage which would protect the position of the holder against the loss of the rights of suit. As a result, the co- operation of the holder of a negotiable transport document or negotiable electronic record is not needed under art. 13 (3), unlike s. 2 (4) of the 1992 Act. The rationale behind art. 13 (1) and (2) is the lack of regulation in any International Convention regulating the carriage of goods by sea. The relevant national laws regulating the transfer of rights of suit are diverse and it can be assumed there is no consensus at international level. Therefore, it was thought that any successful international regulation should deal with the transfer of rights of suit so as to establish uniform rules applicable to all aspects of the carriage of goods. Article 13 of the Draft Instrument deals with the problem of multiple suits against the carrier by varying the rules on burden of proof rather than by divestment.

Also, the rights of suit of the contracting shipper and an intermediate holder of a negotiable transport document or a negotiable electronic record are not extinguished, provided that they suffered loss or damage in consequence of a breach of the carriage contract and that the holder did not suffered such loss or damage. This is because the rights of suit under the Draft Instrument are not linked to being the holder of a negotiable transport document or the transferee of a negotiable electronic record. Therefore, as has been shown before, there are some situations where the person who suffers loss, because of the carrier's breach of the carriage contract, cannot sue the carrier, since no rights have been transferred to him by virtue of s. 2 (1) of the 1992 Act.[224] In these situations, the person who suffered loss or damage in consequence of a breach of the carriage contract, by virtue of art. 13 (3) of the Draft Instrument, would be able to assert the rights of suit against the carrier or the performing party, provided that they suffered such loss or damage and that the holder did not suffer such loss or damage. In contrast, under s. 1 (2) of the 1992 Act, the person who suffered loss or damage in consequence of a breach of the carriage contract would be left to strive to find another foundation, such as implied contract theory, for imposing liability. This would make it easier for the shipowner to escape liability.

2. 8. CONCLUSION

COGSA 1992 has resolved the problems associated with cases such as *The Aliakmon, The Aramis* and *The Delfini* by increasing the range of cases in which a contractual right to sue the carrier is granted to the holder of the bills of lading and the persons to whom delivery is to be made under sea waybills and ship's delivery orders. COGSA 1992 therefore, encourages contracting parties who are not English to provide for their contracts to be

---

[224] Such as the buyer who took delivery against a letter of indemnity and the bill was never transferred to him as in *The Captain Gregos (No 2)*, [1990] 2 Lloyd's Rep. 395.

governed by English Law, so preventing the loss of shipping and insurance business, litigation and arbitration to the City of London and the national economy.

It has been noted that each legislation has its own advantages and disadvantages that might result in solving a problem in a better way than the other. The differences between these legislations have resulted from the approaches that had been taken by each legislator in dealing with the common law rules such as the privity of contract doctrine. Furthermore, these differences might have been magnified by the judicial approaches of solving the weaknesses of their legislation.

The aim of both legislations was to enable the transferee to have contractual rights against the carrier, which will enable him to sue for the loss of or damage to the goods. As shown before, *granting*, under Ch. 801, rather than *transferring*, under COGSA 1992, seems to be more appropriate and will avoid many problems that are faced or might be faced by COGSA 1992. However, the Draft Instrument provides nothing on the terms of the carriage contract on which the third party can sue under art. 13. One could argue, therefore, that the terms of the carriage contract would not include the terms orally agreed by the original parties.

Both sets of legislation provide the transferee of a non- negotiable bill, Ch. 801 06, or the person to whom delivery is to be made under sea waybill, s. 2 (b) of 1992 Act, with contractual rights against the carrier. But, as has been noted before, the 1992 Act is more favourable than Ch. 801 to that person for different reasons, such as the fact that the contractual rights can be ascertained at a glance and according to the terms of that document rather than the need to go down the chain to ascertain his transferor's rights which also are his rights.

In respect of combined transport documents, the position of such documents under English law, COGSA 1992, is uncertain, although treating such documents as true paper

bills of lading, for the purpose of COGSA 1992 and other purposes, might cause legal and practical problems. Under American law, the position of such documents is also uncertain, even if such documents were to be qualified as document of title. However, the enactment of the revision relating to freight forwarder bills of lading might allow combined transport documents to qualify, as documents of title, but such qualification might not be enough to include such documents by the provisions of Ch. 801. However, combined transport documents would, probably, not cause any problem under the Draft Instrument. This is because the definitions of both the carrier and the carriage contract would allow the provision of the Draft Instrument to be applicable to such documents as well as to freight forwarder bills and through bills of lading.

As has been mentioned before, there are some situations where the person who suffers loss, because of the carrier's breach of the carriage contract, cannot sue the carrier, since no rights have been transferred to him by virtue of s. 2 (1) of COGSA 1992.[225] In these situations the shipper, as an original party to the contract, can sue the carrier by virtue of the rule of *Dunlop .v. Lambert*, as an exception to the common law rules in respect of the loss or damage to the goods, since the shipper's rights are not extinguished by virtue of s. 2 (5) of COGSA 1992.[226]

The doctrine of implied contract can also be used to resolve the problem of a person who has suffered loss but without rights to sue the carrier by virtue of COGSA

---

[225] These situations are where the buyer took delivery against a letter of indemnity and the bill was never transferred to him in cases such as *The Captain Gregos* (No. 2); the bill was lost in transmission and so the transferee never acquires possession of it; the bill was delivered to the buyer without the necessary endorsement in cases such as *The Agia Skepi*; the buyer took delivery against document which is not included by s. 1 (1) of the 1992 Act such as a combined transport document; a pledgee with the possession of an order bill of lading (without naming him as a consignee or an endorsee by virtue of s. 5 (2) (b) of COGSA 1992) which neither names him as consignee nor has been validly indorsed by the named consignee. However, a pledgee can sue the carrier where he is named as a consignee or an endorsee, or with the possession of a bearer bill or a bill, which is indorsed in blank.

[226] The shipper will not be able to sue for a third party's loss by virtue of s. 2 (4) of COGSA 1992, since s. 2 (4) enables only the transferee, who has acquired the contractual rights by virtue of s. 2 (1), to recover damages in respect of a third party's loss but, it does not enable the original shipper to do that.

1992, in the above situations and others.[227] It is arguable that suing the carrier under the implied contract doctrine would be more profitable than under the rule of *Dunlop .v. Lambert*.[228] This is because the terms of the implied contract will be those set out in the bill rather than the terms of the initial carriage contract, as *Leduc .v. Ward*, or the terms of the charter-party, as *The Albazero*. Moreover, the representations in the bill of lading would be, by virtue of both s. 4 of the 1992 Act and art. III. 4 of the Hague- Visby Rules, conclusive evidence in the hands of a third party, while it would only be *prima facie* evidence in the shipper's hands.

The utility of the implied contract theory is also needed, in cases such as the absence of an express contract between the consignor and the shipowner, which would undermine the application of COGSA 1992. Since, the contractual rights which would be transferred, by virtue of s. 2 (1), to the holder of the bill or the person to whom delivery is to be made under a sea waybill or a ship's delivery order "as if he had been a party to that contract" and the definition of the carriage contract, under s. 5 (1) (a), is "the contract contained in or evidenced by that bill or waybill".

Thus, in the absence of an express contract, there would be no contract evidenced by or contained in the bill of lading or the waybill and so, a contract should be implied between the buyer and the carrier, unless there is an implied contract between the shipper and the shipowner. Implied contract can also be used to resolve problems between the shipper and the shipowner where is no express contract between them. In *Pyrene .v. Scindia Navigation*,[229] Devlin J., held that there is a contract between the shipowner and the seller on the basis of an implied contract upon presenting the goods, by the seller, for loading and commencing loading by the shipowner. Therefore, the courts should consider

---

[227] This doctrine is analysed in detail in sub- title 5. 2. of chap. 5.
[228] The decisions of the Court of Appeal in *The Aramis* and *The Gudermes* applied very strict restrictions for a contract to be implied between parties without an express contract between them which undermined the mechanism of an implied contract as a good solution to this problem.
[229] [1954] 2 Q.B. 402.

an implied contract as a vital mechanism to resolve problems which are associated with some cases where the cargo owner fall outside the scope of COGSA 1992 for otherwise the cargo owners will have to recourse to tort which would undermine the implementation of the Hague- Visby Rules.[230]

Such situations would not arise under American law since the title to the goods and the cause of action are tied to one criterion that is whether or not the bill has been duly negotiated. The Draft Instrument by virtue art. 13 (1 & 2) provide a person who has suffered loss under such situations with a right to sue in respect of its loss. Also, the absence of an express contract between the original parties under the Draft Instrument would not cause any problem. This is because art. 13 (1) is applicable whether or not a transport document or an electronic record has been issued.

---

[230] However, the 1992 Act does not exclude or limit rights of suit in tort on the ground that an explicit exclusion might prevent the cargo owner from suing the carrier for loss or damage of the goods where he is unable sue under the provision of the Act. See the Commissions Report *supra* fn. 2 at pars. 2. 45 and 5. 24.

CHAPTER THREE: THE CARGO OWNER'S LIABILITIES UNDER THE CARRIAGE OF GOODS BY SEA ACT 1992

3. 1. INTRODUCTION

COGSA 1992 breaks the link between the acquisition of contractual rights and the passing of property. It extends the range of people who can acquire rights against the carrier, including banks which become lawful holders of bills of lading only by way of security. However, the Law Commissions were of the view that a simple linkage between the acquisition of the contractual rights and the imposition of liabilities would be unsatisfactory, for it would make all holders of bills of lading, including banks holding the bill of lading merely as security, liable to the carrier for freight, demurrage and some other charges simply by virtue of their being holders of bills of lading.[1] Therefore, this type of link was ruled out on the basis that it would reverse the House of Lords' decision in *Sewell .v. Burdick*[2] and it would be commercially undesirable because "It is not part of the commercial risks undertaken by a bank, when it merely holds a bill of lading as security, to undertake to perform the substantive obligations contained in the bill".[3]

Instead, a system was introduced whereby the holder of the bill of lading would only be liable to the carrier where the requirements of s. 3 (1) of COGSA 1992 were satisfied.[4] This section provides first that the contractual rights should be acquired by virtue of s. 2 of the 1992 Act. In addition, before liability would be transferred, the holder of the bill of lading would either have to take or demand delivery of any of the goods from the carrier, or make a claim against the carrier in respect of any of those goods under the

---

[1] However, banks as pledgees would not be liable to the carrier under s. 1 of 1855 Act, since they would only have a special property but not a general one.
[2] [1884] 10 App. Cas. 74.
[3] See The English and Scottish law Commissions, *Rights of Suit in Respect of Carriage of Goods by Sea,* (1991) 196 Eng LCR and 130 Scot LCR at para. 3. 3.
[4] The shipper's liability continues after it has transferred the bill of lading, by virtue of s. 3 (3). This is analysed in detail in sub- title 3. 6.

carriage contract; or, in the case of 'spent' bill of lading, to have taken or demanded delivery from the carrier before the rights under the carriage contract were vested in him under s. 2 (1).

3. 2. LIABILITIES' REQUIREMENTS UNDER S. 3 (1) OF THE 1992 ACT

The application of s. 3 (1) of the 1992 Act has recently been tested in two cases; *Aegean Sea Traders Corp. v. Repsol Petroleo S. A. and Another 'The Aegean Sea'* [5] and *Borealis AB .v. Stargas Ltd. and Others 'The Berge Sisar'*.[6]

The facts of *The Aegean Sea* [7] are quite complicated, but put simply, the vessel was proceeding to berth at La Coruna where she grounded on the rocks, broke in two and exploded. The vessel and her cargo were lost, causing large-scale pollution and damage to private property. The shipowners sought to recover their losses from the charterer, ROIL, on the basis that the discharge port was unsafe. They also proceeded against Repsol, the buyers, on the basis that they were liable according to s. 3 (1) (c) of the 1992 Act on one of the two bills of lading under which the cargo was carried. There were two questions before the court regarding the claim against Repsol. First, did Repsol become the holders of one of the two bills of lading by virtue of s. 2 (1) of the 1992 Act? Secondly, did Repsol become liable to the shipowners under that bill by virtue of s. 3 (1) (c) of the 1992 Act? Thomas J., answered the first question negatively on the basis that the requirements of s. 5 (2) (b) were not satisfied, since Repsol never obtained possession of the bills of lading as a result of the completion of an endorsement by delivery. This is because the bills were delivered to ROIL, as principals, and then they were sent to Repsol who refused to accept the delivery of the bills as endorsees. Therefore, the requirements of s. 5 (2) (b) are that the bill must be delivered to the transferee as a principal and that; the transferee must accept

---

[5] [1998] 2 Lloyd's Rep. 39.
[6] [2001] 1 Lloyd's Rep. 663, ([2001] UKHL 17).
[7] See *supra* fn. 5.

the delivery of the bills as an endorsee. Thomas J., furthermore, refused to re- introduce the link between the passing of property and the rights under the bill which the 1992 Act sought to remove. Moreover, Thomas J., held that the requirement of "good faith" in s. 5 imposed some consensual elements on the party of the recipient of a bill of lading, since Repsol knew that the bills of lading should have been endorsed to ROIL who had purchased the cargo from the transferors, Louis Dreyfus. Therefore, it was not necessary to Repsol to re- endorse the bills to the transferors in order to allow them to rectify their error as to re- endorse the bills to ROIL, since it was not the attention of draftsman of the 1992 Act to require the re- endorsement as a precondition of rectifying the error.

As to the second question before the court that related to Repsol's liability to the shipowners under s. 3 (1) (c) of the 1992 Act,[8] Thomas J., held that the issuance of this letter of indemnity, on its particular terms, by Repsol was not a demand for delivery. This is because it was no more than an agreement to indemnify the shipowners if delivery was to be made to the order of Repsol and according to that agreement the shipowners were neither obliged to deliver the cargo to Repsol nor were Repsol obliged to take delivery. Therefore, delivery of the cargo to Repsol under the letter of indemnity would affect the ability to deal with the bills of lading on the basis that it would have no longer governed the delivery obligation. Moreover, the delivery of some of the cargo into Repsol's refinery under the orders of the civil government was not taking delivery according to s. 3 (1) (c) of the 1992 Act. This is because taking or demanding delivery from the carrier under s. 3 (1) was a reflection of the principle that it would only be fair to impose liabilities on the lawful holder if he had done any of the steps mentioned in that section voluntarily. Thus, Repsol's taking of delivery was by an involuntary act, in that it was compelled by the orders of civil government.

---

[8] NB; Thomas J's., conclusion as to the second question is an *obiter dictum* on the basis that Respol never obtained the contractual rights of suit under s. 2 (1), and so they would not have become liable under s. 3 (1) of the 1992 Act.

The application of s. 3 (1) of the 1992 Act was also considered in *The Berge Sisar*[9] but in more detail. The facts of *The Berge Sisar* are no less complicated than those in *The Aegean Sea*. In brief, the vessel sailed from Yanbu in Saudi Arabia to Stenungsund in Sweden and on arrival the intended buyer, Borealis AB, took some samples for analysis. The analysis results showed that the cargo of oil was contaminated. As Borealis's terminal was not able to deal with that type of contaminated cargo, they sold the contaminated cargo to Dow Europe and the vessel was diverted back to Terneuzen in Holland. As a result of that, the shipowners' financial loses were substantial which led to the making of claims and cross- claims by and against the different parties involved in the venture. Before the House of Lords, there were two issues involved the construction of the 1992 Act. First, were Borealis were ever liable to the shipowners, Bergesen, under s. 3 (1) of the 1992 Act? If so, did Borealis cease to be liable under s. 3 (1) when they endorsed the bills of lading over to Dow Europe?

The House of Lords emphasised the importance of the 'relevant consideration' behind the imposition of liabilities on the holder of the bill of lading which was reflected throughout the Law Commissions' Report and eventually the 1992 Act, namely, "[T]he mutuality of the contractual relationship transferred to the endorsee and the reciprocal contractual rights and obligation which arise from that relationship".[10] Therefore, the contractual rights must first be transferred and vested in the holder of the bill by virtue of the operation of s. 2 (1) of the 1992 Act and then, the holder must enforce those rights transferred to him against the carrier by taking one of the positive steps mentioned in s. 3 (1) of the 1992 Act. Those positive steps could take the form of either taking or demanding the performance of the contractual carrier's obligation of delivery by virtue of s. 3 (1) (a)

---

[9] See *supra* fn. 6.
[10] *Ibid*. at 674.

and (c), or making a claim against the carrier for a breach of the carriage contract by virtue of s. 3 (1) (b).

The House of Lords held that taking delivery of the goods would not cause any problem, since it would involve a voluntary transfer of the possession of the goods from the carrier to the holder of the bill. It would also be the final act of the performance of the contractual carrier's obligation. However, "co- operating in the discharge of the cargo from the vessel and providing" or "arranging a berth at which the vessel can discharge" would not be as taking delivery of the goods.[11] Nonetheless, the House of Lords pointed out that demanding delivery or making a claim might create problems to the parties involved in the venture as well as to judges and legal advisers. Therefore, the House of Lords confined the phrase 'makes a claim under the carriage contract' to "[A] formal claim against the carrier asserting a legal liability of the carrier under the carriage contract to the holder of the bill of lading". Accordingly, "issuing a writ or arresting the vessel" but not "expressing a view in the course of a meeting or letter as to the liability of the carrier" would be a formal claim.[12] Also, it confined the phrase 'demands delivery' to "[A] formal demand made to the carrier or his agent asserting the contractual rights as the endorsee of the bill of lading to have the carrier deliver the goods to him". Accordingly, "more formal express communication, such as would have sufficed to support an action in detinue" but not "an invitation or request, or perhaps, even implied form making arrangements" would be a formal demand. [13]

Therefore, the making of a demand which would trigger the operation of s. 3 (1) (a) must arguably be accompanied by the *willingness* to surrender the relevant bill of lading to the carrier or his agent before or at the time of delivery. It seems therefore right to argue that demanding delivery by a person who is not in possession of the relevant bill would not

---

[11] *Ibid.* at 675.
[12] *Ibid.*
[13] *Ibid.*

trigger the operation of s. 3 (1) (a). This is because such a demand would not be made as of right and would therefore not amount to a true 'demand'. Only a bill of lading holder, in possession of the relevant bill, is in a position to demand that the carrier or his agent deliver the goods to him. Therefore, Lord Hobhouse was almost certainly right in concluding that it was difficult to envisage circumstances in which a demand for delivery would be made within s. 3 (1) (c).[14] This is because such a demand would be made when the vessel and its cargo arrive at the destination before the bills of lading which are still in their journey up the chain of banks and buyers. Thus, the intended receiver would demand delivery without the *willingness* to surrender the relevant bills of lading which would not constitute a demand as of right.

The House of Lords, however, held that what Borealis AB had done appeared to have been to direct the vessel to their import jetty and then, having allowed it to berth there, to take the routine samples before clearing it for discharge into their terminal. All these acts were no more than co- operative acts which could not trigger the operation of s. 3 (1) (a) and (c) of taking delivery and should not be confused with demanding delivery.[15] Taking a routine sample of the cargo was a necessity in the trade in which the parties were involved and so "What occurred did not even get as far as the stage of Borealis expressing their willingness to receive the cargo into their terminal". Therefore, one could argue that the decision of the House of Lords would be the same had Borealis been in possession of the bill of lading at the time they requested samples.

But, suppose that the intended receiver who is demanding delivery issues a letter of indemnity asking the carrier to deliver the goods to him which also contains an undertaking to indemnify the carrier for any loss might result out of that demand. Would that demand

---

[14] Treitel comments on Lord Hobhouse's wording that "His use of the words 'unlikely in the extreme', as opposed to 'impossible', has rather the flavour of judicial caution", see Treitel G., "Bills of Lading: Liabilities of Transferee- *The Berge Sisar*" [2001] LMCLQ 345 at p. 349.
[15] See *supra* fn. 6 at pars. 36 and 38.

be sufficient to trigger the operation of s. 3 (1) (c) of the 1992 Act? The House of Lords in *The Berge Sisar* anticipated that a letter of indemnity would be required in the absence of the surrender of the relevant bill of lading and so "The Letter of Indemnity will probably be the best evidence of what arrangement has been made and will probably contain appropriate express terms".[16] Moreover, Thomas J in *The Aegean Sea* [17] held the letter of indemnity issued by Repsol, *on its terms*, was not a demand for delivery. This implies that a letter of indemnity in different terms might constitute a demand for delivery as to trigger the operation of s. 3 (1) (c) of the 1992 Act. On the one hand one could argue that any demand accompanied by a letter of indemnity, on those terms, might satisfy the requirements of the formal demand specified, above, by the House of Lords. The reason for that is the intended receiver, throughout the letter of indemnity, is expressing his willingness to receive the cargo from the carrier and that type of step is positive and voluntary made to enforce the potential rights which would be transferred to and vested in him by virtue of s. 2 (2) of the 1992 Act. On the other hand, if it is the *entitlement* to take delivery rather than *willingness* to do so which constitutes a formal demand for delivery, only the holder of bill of lading would be entitled to take delivery of the goods as of right.

Thomas J., in *The Aegean Sea*,[18] stated that

> "Although the letter of undertaking was in my view (on the basis of the facts set out at p. 57, ante) provided by Repsol, even if in the context of ROIL's obligations under cl. 13 of the charter- party, I do not consider it was a demand for delivery. The letter of undertaking was on its terms an undertaking that, if delivery was made to the order of Repsol, then Repsol would indemnify the owners against any claim that might be made under the bills of lading. It did not oblige Repsol to take delivery or oblige the owners to deliver to the order of Repsol. It was in short an agreement to indemnify that took effect only if delivery was made to the order of Repsol. On its terms the letter of indemnity was therefore not a demand for deliver".

He then proceeded as follows

---

[16] *Ibid.* at 676.
[17] See *supra* fn. 5 at 61- 62.
[18] *Ibid.* at 61.

> "Furthermore, the owners, despite the letter of indemnity, remained under the obligation under the bills of lading to deliver to the lawful holder of the bills. They were not obliged to deliver under the letter of indemnity. If, for example, insolvency had supervened had Louis Dreyfus had not endorsed the Sun Oil bill of lading but retained it, then the owners' obligation would have been to deliver the cargo to Louis Dreyfus as lawful holder of that bill of lading. If the owners had in fact entered into an agreement under which they had undertaken to deliver the cargo comprised in the bills of lading to the order of Repsol, then that would have affected the ability to deal with the bills of lading as the bills of lading would no longer have governed the obligation to deliver".[19]

Nonetheless, it is arguable that the effect of demanding delivery under s. 3 (1) (c) should not be different from taking delivery, since the carrier in both cases is under no obligation to deliver the goods to the intended receiver without the surrendering of the relevant bill of lading. A contrasting conclusion might arguably undermine the application and the existence of s. 2 (2) of the 1992 Act.

As to the issue of whether Borealis AB ceased to be liable to the shipowners when they endorsed the bills to Dow Europe so as to transfer their rights of suit to the latter,[20] the House of Lords, solely upon the construction of the 1992 Act unqualified by any special factors, were of the view that an intermediate endorsee's liabilities under s. 3 (1) would cease when he endorsed over the bill of lading to another person so as to transfer the rights of suit to that person. The House of Lords based its decision, as to the intermediate endorsee's liabilities, upon two principles. First, the draftsman of the Act did not intend to reverse the decision in *Smurthwaite .v. Wilkins*,[21] despite the fact that the decision in *Smurthwaite .v. Wilkins* was based on the wording of s. 1 of the 1855 Act. The 1992 Act in both s. 2 (1) and s. 3 (1) adopted the same crucial words[22] and so their repetition implies that the construction of those words must be done in the same way. Secondly, the

---

[19] *Ibid.* at 62.
[20] The Court of Appeal in *The Berge Sisar*, [1998] 2 Lloyd's Rep. 475, decided in favour of Borealis AB by the majority, Millett and Schiemann, against the minority, Sir Brian Neill who preferred the view that Borealis's liability continued even after the endorsement of the bill to Dow Europe.
[21] [1862] 11 CB (NS) 842.
[22] The words adopted in s. 2 (1) are "shall have transferred to and vested in him all rights of suit under the contract of carriage" and in s. 3 (1) "shall become subject to the same liabilities under that contract".

intermediate holder's rights are extinguished, by virtue of s. 2 (5) of the 1992 Act, where those rights are transferred to and vested in a new holder by virtue of the operation of s. 2 (1) of 1992 Act. The non- existence of any corresponding section in the 1992 Act as to the intermediate holder's liabilities should not create a problem, because the principle of mutuality between s. 2 (1) and s. 3 (1) should prevent the continuity of an intermediate holder's liabilities where his rights are extinguished.[23]

In general, it is arguable that the House of Lords in *The Berge Sisar* was right in concluding that the draftsman of the 1992 Act did not intend to reverse the decision in *Smurthwaite .v. Wilkins*.[24] However, the decision in *Smurthwaite .v. Wilkins* anticipated only that an intermediate holder should not be liable to the carrier who simply transferred the bill of lading in pursuance of normal commercial dealing without taking a further positive step such as demanding delivery. Therefore, reaching that conclusion on the basis of a comparison between the words of the 1855 Act and the 1992 Act regardless of the words which specified the conditions on which liability would be imposed seems strange and unconvincing.[25] This is because an intermediate holder would not be liable to the carrier under the 1992 Act unless the conditions of s. 3 (1) were satisfied. Furthermore, the Law Commissions argued in favour of the bill of lading holder being subject to liabilities that "It would be unfair to shipowners to widen the category of persons able to assert contractual rights against them whilst, at the same time, taking away the ability of the shipowner to assert contractual rights against such person".[26] Using the same argument should arguably prevent any expansion to the category of persons being subject to

---

[23] For the opposite point view see Thomas J's preliminary view in *The Aegean Sea*, *supra* fn. 5 at 63, that "if a person who is, at the time he makes the demand for delivery the lawful holder, then the conditions in s. 3 are satisfied as he is at that time the person in whom 'rights are vested' under s. 2 and liabilities are therefore imposed on him under s. 3 and they remain with him". Approved by Sir Brian Neill in his dissenting judgment in the Court of Appeal in *The Berge Sisar*, *supra* fn. 20 at 484.

[24] See *supra* fn. 21.

[25] For the support for this view, see Reynolds, F. M. B., "The Carriage of Goods By Sea Act 1992 Put To The Rest" [1999] LMCLQ, 161 at 163.

[26] The Law Commissions Report *supra* fn. 3 at para. 3. 10.

liabilities without taking one of the steps mentioned in s. 3 (a- c) of the 1992 Act. The shipowners' argument would entail such an expansion. Nonetheless, the principle of mutuality anticipated by the House of Lords' *obiter* views could arguably entail a contraction of the class of potential defendants when compared to the position under the 1855 Act because under that Act the contractual benefits and burdens are transferred together. Suppose *Smurthwaite's* facts were replicated under COGSA 1992 but with the lawful holder not triggering s. 3 (1). Neither the eventual holder of the bill of lading nor the intermediate holder would be liable, if the operation of s. 3 (1) was not triggered by the final holder of the bill. This conclusion would not be possible under the 1855 Act on the basis that the contractual burdens and benefits are tied together.

However, the House of Lords in *The Berge Sisar*, anticipated that the inter- relation of s. 2 and s. 3 of the 1992 Act depends on the particular facts in any subsequent case "the conduct of one or other party may give rise to estoppels as where one party has been led to exercise forbearance in reliance upon some conduct of the other. In most cases there will be other documents or agreements to take into account besides the bill of lading such as charter parties, letters of indemnity, non- separation agreement, or ad hoc agreements".[27] The criterion used by Millett L J., in the Court of Appeal in *The Berge Sisar*,[28] where he concluded that "Liability does not remain irrevocably with the holder of the bill who takes any of the steps mentioned in the section unless, of course, the nature of those steps precludes any further dealing with the goods", can also be used as a guidance.

Accordingly, taking delivery, under s. 3 (1) (a), should not cause any problem as it would involve a voluntary transfer of the possession of the goods from the carrier to the holder of and would also be the final act of the performance of the contractual carrier's obligation of delivery. Under such circumstances, the bill would normally be surrendered

---

[27] See *supra* fn. 6 at para. 43.
[28] See *supra* fn. 20 at 487.

on taking that delivery of the goods and so it would prevent any further of dealing with the bill of lading as well as with the goods. This conclusion is in consistent with Lord Hobhouse's criterion "The character of the conduct which attracks the liability imposed by s. 3 (1) is expected to have an element of relative finality; it is not conduct which is tentative or equivocal nor conduct which is equally consistent with the person leaving it to a later endorsee to exercise the rights transferred by s. 2 (1)". Also, taking delivery, under s. 3 (1) (c), should not cause any problem, even though such taking of delivery would not be against the surrender of the bill of lading but, perhaps, against a letter of indemnity. Accordingly, would the intermediate holder of the bill of lading who, for example, asked the carrier to discharge the cargo at another port during the course of the voyage remain liable to the carrier even if he decided to endorse to the bill of lading to another transferee? By virtue of Lord Hobhouse's 'principle of mutuality' such intermediate holder would have had the benefit of such delivery, but as a result of the further transferring of the bill of lading to another transferee, he will have lost the benefit of being able to sue the carrier for the loss of or the damage to the cargo as a breach of the carrier of the carriage contract. Therefore, the final transferee would have the contractual rights of suit under s. 2 (1) and so would be liable to the carrier under s. 3 (1) where the requirements of that section were satisfied.[29]

However, the potential problem might exist under s. 3 (1) (a) and (c) relating to demanding the delivery of the goods. Therefore, the intermediate holder of a bill of lading who demanded delivery which is later withdrawn should not remain liable to the carrier. Millett L J., in the Court of Appeal in *The Berge Sisar*,[30] stated that "Liability does not remain irrevocably with the holder of the bill who takes any of the steps mentioned in the section unless, of course, the nature of those steps precludes any further dealing with the

---

[29] For Treitel's comments on Lord Hobhouse's wording see *supra* fn. 14 at p. 349.
[30] See *supra* fn. 20 at 487.

goods". Therefore, demanding delivery without the actual delivery of the goods would not make the intermediate holder's position irreversible.[31] This conclusion is also consistent with Lord Hobhouse's criterion "The character of the conduct which attracts the liability imposed by s. 3 (1) is expected to have an element of relative finality; it is not conduct which is tentative or equivocal nor conduct which is equally consistent with the person leaving it to a later endorsee to exercise the rights transferred by s. 2 (1)".[32]

The other questionable type of demanding of the delivery from the carrier would be under s. 3 (1) (c) would arguably not be relevant. This is because such a demand would not be made as of right and would not therefore amount to a true 'demand'. Only a bill of lading holder, in possession of the relevant bill, is in a position to demand that the carrier or his agent deliver the goods to him. Therefore, Lord Hobhouse was probably right in concluding that it was difficult to envisage circumstances in which a demand for delivery would be made within s. 3 (1) (c).[33] This is because such a demand would be made when the vessel and its cargo arrive at the destination before the bills of lading which are still in their journey up the chain of banks and buyers. Thus, the intended receiver would demand delivery without the *willingness* to surrender the relevant bills of lading which would not constitute a demand as of right.

Making a claim against the carrier under the carriage contract, by virtue of s. 3 (1) (b), would not make the intermediate holder's position irreversible similar to that of demanding delivery of the goods under s. 3 (1) (a). Therefore, if the intermediate holder decided to withdraw the claim and instead endorsed the bill of lading to another transferee, he should also remain liable to the carrier by virtue of s. 3 (1) (b) of the 1992 Act.

---

[31] But, it is arguable that demanding delivery without the actual delivery can be irreversible where the cargo is lost and there are no goods to be delivered. Therefore, the holder of the bill would be liable to the carrier on demanding delivery which was the purpose of making him liable to the carrier so as not to enable him to wake out of the carriage contract in the absence of actual delivery.

[32] See *supra* fn. 6 at para. 41.

[33] For Treitel's comments on Lord Hobhouse's wording see *supra* fn. 14 at p. 349.

However, indicating that the intermediate holder of the bill of lading will be holding the carrier responsible for the damage of the cargo during the voyage should not be considered as making a claim. This is because Lord Hobhouse in *The Berge Sisar*[34] concluded that "expressing a view in the course of a meeting or letter as to the liability of the carrier" would not be a formal claim but rather "issuing a writ or arresting the vessel".

3. 3. THE CARGO OWNER'S LIABILITY UNDER THE DRAFT INSTRUMENT

The Draft Instrument, by virtue of art. 12 (2) (2) provides that "Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes any liability imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record". Accordingly, the final holder of a negotiable transport document or the final transferee of a negotiable electronic record who claimed or took delivery of the goods at their destination, under art. 10 (3) (a) (i & ii), or who exercised his right of control under art. 11 (1) and art. 11 (2) (b & c), would assume any liabilities imposed under the carriage contract to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record. The notes to art. 12 (2) (2) make it clear that the intention is to impose certain liabilities only on the shipper, such as liabilities under the articles 7 (1) and 7 (3).[35] The Draft Instrument, by virtue of both arts. 12 (2) (1 & 2), provides that the contracting shipper would still assume liabilities imposed under the carriage contract and therefore, the effect of these articles is to replicate s. 3 (3) of the 1992 Act.

---

[34] See *supra* fn. 6 at 675.

[35] See UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc. A/CN.9/WG.III/WP.21, (15- 26 April 2002), (Hereinafter U.N. Doc. A/CN.9/WG.III/WP.21) at para. 199. The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

Article 12 (2) (1) provides that "Without prejudice to the provisions of article 11. 5, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder". Under this provision a holder would not assume any liability under the carriage contract solely by reason of becoming the holder which replicates the effect of s. 3 (1) of the 1992 Act. On the one hand, by virtue of art. 11 (2) (d), the intermediate holder of a negotiable transport document or the intermediate transferee of a negotiable electronic record who transferred the right of control without having exercised that right shall be discharged from the liabilities imposed on the controlling party by virtue of the carriage contract or by virtue of this set of Rules. On the other hand, by virtue of art. 11 (2) (b & c), the intermediate holder of a negotiable transport document or the intermediate transferee of a negotiable electronic record who transferred the right of control but having exercising that right shall also be discharged from the liabilities imposed on the controlling party by virtue of the carriage contract or by virtue of this set of Rules, provided that such instructions are stated on the negotiable transport document or in the negotiable electronic record, under art. 11 (2) (b) (iv) or art. 11 (2) (c) (iii). However, the only liability an intermediate holder or transferee can incur, under art. 11 (2) (b & c), is that of giving instructions to the carrier under that article. Accordingly, the intermediate holder's liabilities are extinguished, under the Draft Instrument, whether or not he exercised his right of control, as long as the right of control has been transferred, or the possession of a negotiable transport document has been transferred with the necessary endorsement to a new holder or the exclusive access to or control of a negotiable electronic record has been transferred to a new transferee, in pursuant to art. 12 (4). In contrast, under s. 2 (5) of the 1992 Act, the rights of the intermediate holder are extinguished but there is no equivalent provision specifying whether his liabilities are also be extinguished. The issue of

intermediate holder's liabilities, therefore, has been left to be decided by the English courts as in *The Berge Sisar*.[36]

In contrast, the liability of consignee named in a sea waybill, by virtue of art. 12 (4), seems to be left to national law applicable to the carriage contract relating to the transfer or rights. This considerably undermines the uniformity of the Rules.

3. 4. UNDISCLOSED LIABILITIES RUN WITH S. 3 (1) OF THE 1992 ACT

The other issue related to the eventual cargo owner's liability under s. 3 (1) of the 1992 Act is the question of what risks of undisclosed liabilities does the eventual cargo owner take when he triggers the operations of s. 3 (1) of the 1992 Act, particularly as regards dangerous cargo and freight. This is because the Law Commissions in their Report decided neither to distinguish between pre- shipment and post- shipment liabilities nor to make a special provision relieving the consignee or the endorsee from liability caused by the shipper's breach of warranty as not to ship dangerous cargo.[37]

3. 4. 1. LIABILITY FOR DANGEROUS CARGO

3. 4. 1. 1. Liability for Dangerous Cargo under s. 3 (1) of the 1992 Act

The question of whether the eventual cargo owner would be liable to the carrier in respect of dangerous cargo under s. 3 (1) of the 1992 Act was not answered by the Law Commissions' Report. This issue was not also considered by English courts neither under s. 1 of the 1855 Act nor under s. 3 (1) of the 1992 Act. However, the House of Lords in

---

[36] See *supra* fn. 6.
[37] See the Law Commissions' Report *supra* fn. 3 at paras. 3. 20- 3. 22.

Effort Shipping Co. Ltd. v. Linden Management AS and Others "The Giannis NK",[38] albeit *obiter*, took the view that the liability of the holder of the bill of lading under s. 1 of the 1855 Act would be "by way of addition, not substitution". This issue can be decided under English law by examining the words of both s. 3 (1) of the 1992 Act and art. IV (6) of the Hague- Visby Rules; COGSA 1971.

As to the words of s. 3 (1) of the 1992 Act, which might give an enlightenment to this issue, suggest that the third party assumes *all* the liabilities to which the original party to the carriage contract was subject.[39] Liabilities under the carriage contract can be imposed on the shipper either by the terms of the bill of lading or the statutory provisions such as the Hague and Hague- Visby Rues. It is arguable therefore that any liability imposed upon the shipper by the statutory provisions, such as arts. IV (6) and III (5) of the Hague and Hague- Visby Rules, should not be transferable to the third party on whom the liabilities are imposed by virtue of s. 3 (1). This argument can be supported by s. 5 (5) of the 1992 Act which provides that "The preceding provisions in this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague- Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971". Therefore, the courts should not manipulate the words of the Hague- Visby Rules so as to impose liability on the third party. This is because the aim of

---

[38] [1998] 1 Lloyd's Rep. 337 at 344. However, the House of Lords held that the shipper, under the 1855 Act, remains liable to the carrier for his breach of warranty not to ship dangerous cargo. Also, Mustill J., in *The Athanasia Comninos and Georges Chr. Lemos*, [1990] 1 Lloyd's Rep. 277 at 281, held that "but the Act cannot in my judgment have been intended to divest the shipper of responsibility for the consequences of loss, arising from the act of shipment itself". The continuity of the shipper's liability is made expressly by the wording of s. 3 (3) of the 1992 Act and so the issue in *The Giannis NK* would neither arise nor cause a problem under the 1992 Act.

[39] It is submitted that the transferee under s. 3 (1) of the 1992 Act is treated as if he had been a party to the original carriage contract by using the words "that contract" and so incurred *all* liabilities. This is because the holder is liable only if he takes one of the active steps, mentioned in s. 3 (1), to claim the benefits of the carriage contract. See Treitel, G., & Reynolds, F.M.M., *Carver on Bills of Lading*, London: Sweet & Maxwell 2001, at para. 5- 095 and para. 9- 220.

the 1992 Act is to remove the privity problem but not to substitute 'the third party' with 'the shipper' for all purposes.[40]

A contrasting view can be found in *The Giannis NK* [41] where both Lord Lloyd of Berwick and Lord Steyn were of the view that all the shipper's liabilities *are* transferred to the eventual buyer on whom the liabilities are imposed under the s. 1 of the 1855 Act. Millett L J in the Court of Appeal in *The Berge Sisar* agreed with the above *dictum* of both Lord Lloyd of Berwick and Lord Steyn in *The Giannis NK* and added "The liability of an endorsee was by way of addition to that of the consignor but by way of substitution for that of a previous endorsee. Although different mechanisms were employed in relation to the vesting of rights and liabilities, they were closely linked; it was only the consignee or endorsee who had the rights of suit who was subject to liabilities".[42] Furthermore, the Law Commissions' Report declined to include a special provision to prevent third parties from being liable in respect of the shipment of dangerous goods on the basis that

> "We do not think that liability in respect of dangerous goods is necessarily more unfair than liability in respect of a range of other matters over which the holder of the bill of lading has no control and for which it is not responsible, as for instance liability for loadport demurrage and dead freight. Also it may be unfair to exempt the endorsee from dangerous goods' liability in those cases where he may have been the prime mover behind the shipment. Furthermore, it is unfair that the carrier should be denied redress against the indorsee of the bill of lading who seeks to take the benefits of the contract of carriage without the corresponding burdens".[43]

However, one could argue that making the third party liable for pre- shipment charges such as dead freight and loadport demurrage can be accepted on the ground that he

---

[40] For support for this view see Gaskell, N.,(*et al*), *Bills of Lading: Law and Contracts*, LLP, 2000, at para. 4. 49- 4. 55 and Baughen, S., and Campbell, N., "Apportionment of Risk and the carriage of Dangerous Cargo" [2001] IML 1 at 7. However, Gaskell reaches different conclusion on this issue at para. 15. 52.

[41] See *supra* fn. 38 at 344 and 349.

[42] See *supra* fn. 20 at 485. However, the House of Lords in *The Berge Sisar*, *supra* fn. 6, proceeded on the assumption that the shipper's liability in respect of dangerous goods is transferable to third parties provided they trigger the operation of s. 3 (1) of the 1992 Act.

[43] See the Law Commissions' Report *supra* fn. 3 at para. 3. 22. However, this argument is subject to different criticisms. For these criticisms see Gaskell, N., *supra* fn. 40 at para. 4. 54 and Baughen, S., and Campbell, N., *supra* fn. 40 at 7.

can be warned of his potential liabilities for those charges by the terms of the bill of lading or the terms of the charter- party which are suitably incorporated in the bill of lading. It should also be noted that the words of s. 3 (1) have yet to be ruled on by English court in this context, since the *dicta* of both Lord Lloyd of Berwick and Lord Steyn in *The Giannis NK* were an *obiter*. Furthermore, the absence of any special provision in respect of the shipment of a dangerous cargo in the Law Commissions' Report leaves the door open to the courts to decide this matter, favourably, in favour of third parties. This is because the third party would not be able to give a notice to the carrier as to carry the goods safely as a result of the lack of the means of knowledge of its dangerous characteristics or its insufficient packing.

However, apart from the common law, the shipper's obligation and liability relating to dangerous cargo are also governed by art. IV (6) of the Hague- Visby Rules; COGSA 1971. Therefore, the question of whether the shipper's liability is transferable to the eventual cargo owner under s. 3 (1) of the 1992 Act is related to the question whether this liability can be transferable to another person other than the shipper under the Hague- Visby Rules. Thus, the interpretation of the shipper's obligations under the Hague- Visby Rules is decisive as to whether any person other than the shipper could be liable to the carrier for the shipper's breach of his obligation as not to ship dangerous cargo under art. IV (6). This view is supported by Lord Cooke of Thorndon in *The Giannis NK* [44] where he commented upon the expression 'free- standing' as to the question of the interrelation between art. IV (3) and art. IV (6) "Like every other document, the Rules have to be read as a whole and Article IV, r. 6 is an integral part of them". The Hague- Visby Rules, unlike the Hamburg Rules, provide no definition to the word "shipper" which could arguably be useful in providing guidance for the above question. It is arguable therefore that the

---

[44] See *supra* fn. 38 at 350.

language of the relevant parts of the Hague- Visby Rules would provide authoritative guidance to the intention of the framers of the Rules so as to create consistent meaning which reflects the intention of the Rules.

The shipper, under art. III (5) of the Hague- Visby Rules, should guarantee to the carrier the accuracy of the marks, number, quantity and weight, as furnished by him, at the time of shipment. As a result, the shipper would indemnify the carrier for all losses, damages and expenses arising out of inaccuracies of such information. The shipper's guarantee, under art. III (5), is a personal guarantee so as the shipper is the only person who would be liable to the carrier under this guarantee. Therefore, the liability under this guarantee would not be transferable to any other person, such as the eventual buyer, by virtue of s. 3 (1) of the 1992 Act.[45] Thomas J., in *The Aegean Sea* [46] held that the shipper's obligation under this guarantee is solely of the shipper and would not be transferred. In his opinion, the nature and the source of this obligation was such as it remained with the shipper and was not transferred. This conclusion is confirmed by the last sentence of art. III (5) which provides that "The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper". Furthermore, one could argue that a contrary conclusion would undermine art. III (4) which prevents the carrier from introducing a proof to the contrary regarding such information "when the bill of lading has been transferred to a third party in good faith".

The carrier, by virtue of art. IV (2) (i) of the Hague- Visby Rules, would not be liable for loss or damage resulting from "Act or omission of the shipper or owner of the goods, his agent or representative". This article was considered by the Court of Appeal in *Filikos Shipping Corporation of Monrovia .v. Shipmair B.V., (The Filikos)*[47] which held

---

[45] For support for this view see Boyd, S., (*et al*) *Scrutton on Charterparties and Bills of Lading*, 20th edition, London: Sweet & Maxwell 1996, at pp. 433- 434.
[46] See *supra* fn. 5 at 70.
[47] [1983] 1 Lloyd's Rep. 9.

that any reference in the Hague Rules to the shipper or owner of the goods would not be read as a reference to the charterer, since the charterer is not the shipper or owner of the goods. Dillon LJ., added that "I can see no reason for doing such violence to the language of art. IV and I can see nothing in *Adamastos* to warrant it. The position may for, any of many reasons, be different if the charterer is the sole owner of the goods, but that we do not have to consider".[48] Therefore, the term "shipper" in art. IV (2) (i) of the Hague- Visby Rules could not be read as a reference to the eventual buyer but only and solely to the shipper.

The shipper, by virtue of art. IV (3) of the Hague- Visby Rules, would not be liable to the carrier for any loss or damage resulting from any cause without "the act, fault or neglect of the shipper, his agents of his servants". The interpretation of art. IV (3) of the Hague- Visby Rules was considered by Thomas J., in *The Aegean Sea*.[49] Thomas J., held that the term "shipper" in art. IV (3) could only refer to the shipper and not to any other person such as the eventual buyer to whom the liabilities are imposed under s. 3 (1) of the 1992 Act.[50] He also refused to qualify the other obligations which are transferred by art. IV (3) on the basis that "Article IV, r. 3. is dealing with the obligations of the shipper in his capacity as shipper and not with the other liabilities of those who become subject to those other liabilities under the bill of lading by virtue of s. 3 of COGSA 1992".[51]

Finally, art. IV (6) of the Hague- Visby Rules relating to the shipment of dangerous cargo provides that

> Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by

---

[48] *Ibid.* at 12.
[49] See *supra* fn. 5 at 69.
[50] Thomas J., agreed with the observations made by the editors of *Scrutton on Charterparties and Bills of Lading* in the commentary to art. III (5) at p. 434, art. IV (3) at p. 451 and art. IV (6) at p. 453. For full citation of these observations see Boyd, S., *supra* fn. 45 at pp. 434, 451 and 453 respectively.
[51] See *supra* fn. 5 at 70.

> the carrier without compensation and the shipper of such goods shall be liable for all damages directly or indirectly arising out of or resulting from such shipment. If any goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Thomas J., in *The Aegean Sea* [52] considering the term 'shipper' in art. IV (3) of the Hague-Visby Rules was of the view that the obligation not to ship dangerous cargo is solely that of the shipper and will not be transferred to the eventual buyer on whom the liabilities are imposed under s. 3 (1) of the 1992 Act. Scrutton argues that the term 'shipper' where it appears in the Hague and Hague- Visby Rules should be interpreted in the same way as to refer solely to the shipper. His view based on the interpretation of the guarantee imposed on the shipper under art. III (5) of the Hague and Hague- Visby Rules as the shipper should only, and not the third party, be liable under this guarantee.[53] However, this argument has been subject to criticism by Mildon and Scorley[54] on the basis of the last sentence of art. III (5) which states that "The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper". Accordingly, they argue that the term 'shipper' where it appears in the Rules will not, without more specification, imply that liability created by that article is either personal to the shipper or incapable of being transferred to a third party. However, Baughen and Campbell oppose this argument on the basis that it would contradict the use of the term 'shipper' linguistically.[55] They also argue by analogy with the decision of the House of Lords in *The Miramar*[56] where the House of Lords refused to manipulate the wording of the charter- party as to impose liability on the holder of the bill of lading on the basis that

---

[52] *Ibid.*
[53] See Boyd, S., *supra* fn. 45 at pp. 434 and 453.
[54] Mildon, D., and Scorley, D., "Liabilities of the Transferees of Bills of Lading" [1999] IJOSL 94.
[55] See Baughen, S., and Campbell, N., *supra* fn. 40 at 7.
[56] [1984] 2 Lloyd's Rep. 129.

its wording was not elect to impose liability on any other person other than that the charterer. Nevertheless, the absence of an equivalent words in art. IV (6) as to that of the last sentence of art. III (5) might arguably indicate the transferability of this obligation to the third party.[57] One could argue, however, that this argument is based on misreading of the aim behind the words contained in the last sentence of art. III (5). That aim is to prevent a potential contradiction between the sub- rules (4) and (5) of art. III as not to undermine sub- rule (4) of art. III which prevents the carrier from introducing a proof to the contrary regarding such information "when the bill has been transferred to a third party in good faith".

It is sumitted, however, that the view of Thomas J., should be preferred on the basis that the issue should be considered solely on the words of art. IV (6) of the Hague- Visby Rules, in addition to the words of arts. III (5), IV (2) (i) and IV (3) which might give useful guidance, rather than the words of either s. 3 (1) of the 1922 Act or s. 1 of 1855 Act, in deciding whether the shipper's obligation not to ship dangerous cargo is a personal obligation, which is not be transferable to a third party by virtue of s. 3 (1) of the 1992 Act. Furthermore, Lord Campbell in *Brass .v. Maitland*[58] held that the shipper's implied liability at common law should be strict on the basis of the shipper having the means of ascertaining the dangerous characteristics of the cargo. He commented that

> Although those employed on behalf of the shipowner have no reasonable means during the loading of a general ship to ascertain the quality of the goods offered for shipment, or narrowly to examine the sufficiency of the packing of the goods, the shippers have such means; and it seems much more just and expedient that, although they were ignorant of the dangerous quality of the goods or insufficiency of the packing, the loss occasioned by the dangerous quality of the goods and insufficient packing should be cast upon the shippers than upon the shipowners.

---

[57] See Gaskell, N., *supra* fn. 40 at para. 15. 52.
[58] [1856] 6 E & B 470 at 483.

According to this reason of policy, third parties would not arguably be considered as ignorant but rather not having the means of knowing that the goods were dangerous or insufficiently packed, since the third party can hardly be said to have induced the shipment of the goods in their dangerous condition, even they might have induced the shipment of those goods as the Law Commissions' Report anticipated.[59] Furthermore, the second sentence of art. IV (6) declines to make the shipper liable in damages to the carrier when the goods are shipped with the carrier's consent and knowledge of their nature and character.

Accordingly, the third party would not have the chance of satisfying the requirement of non- responsibility on the basis of the absence of the means of knowing the dangerous characteristics of the goods or its insufficient packing prior taking delivery. This line of argument is supported by Colinvaux, R., where he argues that "That concerned the implied warranty of a shipper to give notice of the dangerous character of the cargo shipped. But that would appear to be a warranty outside the terms of the bill of lading, non-compliance with which may induce the master to accept the goods and to sign the bill of lading, . . . , if that is so, it would not create a liability apt to be transferred to the consignee under the Act".[60] Making the third party liable under art. IV (6), without having the chance of satisfying the requirement of non- responsibility, would arguably be undesirable and unacceptable. This is because it would put the shipper in a better position and would not create consistency and uniformity between the language of the relevant parts of the Rules; arts. III (5), IV (2) (I) and IV (3).

The issue of overlap between the obligation imposed under art. IV (6) and that imposed impliedly at common law or/ and expressly by the terms of the bill of lading will be critical if, however, English courts decide to confine the obligation imposed under art.

---

[59] See the Law Commissions' Report *supra* fn. 3 at para. 3. 22.
[60] See Colinvaux, R., *Carver's Carriage by Sea*, 13th Ed., London: Stevens & Sons 1982, fn. 96 at p. 68.

IV (6) to the original shipper and so to allocate the loss occasioned by the dangerous quality of the goods and insufficient packing upon the shipper rather than the third party. One of the critical points of the overlap between the obligation imposed under art. IV (6) and that imposed impliedly at common law is that whether the shipowner would be able to sue a third party at common law for loss or damage caused by the shipment of goods which are dangerous in a non- physical or legal manner.[61] In *The Fiona*[62] Diamond J., concluded that the shipowner's exclusive remedy must be governed by art. IV (6) of the Hague-Visby Rules and so the common law obligation not to ship dangerous cargo should not be considered, provided that the Rules applied by statute. At the first instance in *The Giannis NK*[63] Longmore J., concluded that art. IV (6) deals only with physical dangerous cargo but not with non- physical dangerous cargo and so the rights of the parties in relation to such cargo should be governed by the provisions implied by the law governing the carriage contract. Hirst L J., in the Court of Appeal confirmed the *dictum* of Longmore J., and emphasised the lack of overlap between the obligation imposed under art. IV (6) and that imposed impliedly at common law.[64] Lord Lloyd of Berwick and Lord Steyn in the House of Lords did not deal with this issue, even though Lord Steyn (*obiter*) agreed arguably with the *dictum* of Longmore J.[65]

The other critical point of the overlap between the obligation imposed under art. IV (6) and that imposed impliedly at common law is whether the shipowner would be able to sue a third party at common law for loss or damage caused by the shipment of goods, in

---

[61] Mustill J., in *The Athanasia Comninos*, [1990] 1 Lloyd's Rep. 277 at 281, (*obiter*) concluded that the holder of the bill of lading could not be liable, under an implied contract, for the breach of warranty as to the fitness of the goods for carriage. He stated that "There is to my mind no reason to assume, from the bare facts of presentation and delivery, that the parties intended the consignee to be made subject to a retrospective liability for acts with which he had nothing to do".

[62] [1993] 1 Lloyd's Rep. 257 at 268.

[63] [1994] 2 Lloyd's Rep. 171 at 180.

[64] [1996] 1 Lloyd's Rep. 577.

[65] See *supra* fn. 38 at 341 and 346, respectively. The reason for not dealing with this issue is that both Lord Lloyd of Berwick and Lord Steyn in the House of Lords held that the goods were physically dangerous according to art. IV (6) on the basis that it resulted of an order for the dumping of the entire cargo, even though it caused no *direct* physical damage to the other goods.

circumstances in which the master's consent would prevent the claim from being made under art. IV (6) of the Hague- Visby Rules but not under common law. This is because a claim can be advanced against a third party under an express term of carriage contract; the bill of lading rather than under art. IV (6) of the Hague- Visby Rules as in *Chandris .v. Isbrandtsen- Moller.*[66] The unfortunate non- committal attitude of the House of Lords in *The Giannis NK* to recovery of pure economic loss under art. IV (6) leaves the door wide open to further litigation. However, one could argue that the third party should not be liable in respect of the shipment of dangerous cargo under the common law duty on the basis that they would not be able to give notice to shipowners as to enable them to carry dangerous cargoes in safe ways.

In the absence of any conclusive judicial decision on the question of whether the liability in respect of dangerous cargo is transferable to third parties, express terms in the bill of lading may be the only way of resolving this problem. On the one hand, express clauses in some bills of lading clarified this issue and imposed the obligation not to ship dangerous cargo on the consignor, such as clause 19 of 'Multidoc' form bill and clause 18 of 'Combidoc' form bill. One could argue that the inclusion of such clauses would relieve third parties from a potential liability in respect of dangerous cargo, under art. IV (6), on the basis of art. V of the Hague and Hague- Visby Rules allows the carrier "to surrender in whole or in part all or any of his rights and immunities" under these Rules. On the other hand, an express clause in a bill of lading, such as clause 14 of the 'K' Line form of bill of lading, imposed the obligation not to ship dangerous cargo on the merchant. One could also argue that such clause would not be helpful a part of alerting third parties of their potential liability in respect of dangerous cargo. However, the validity of such a clause would arguably be doubtful where the Hague and Hague- Visby Rules apply, on the basis

---

[66] The claim in *Chandris .v. Isbrandtsen- Moller*, [1951] 1 KB 240, was advance on the express provision of the charterparty rather under the 'paramount clause' incorporating the COGSA 1936 (US).

of art. III (8) of the Rules, provided that the courts decided in favour of the assumption that the obligation under art. IV (6) of the Rules is not transferable to a third party.

3. 4. 1. 2. Liability for Dangerous Cargo under the Draft Instrument

Article 7 (6), provides that the shipper is liable to the carrier "for any loss, damage, or injury caused by the goods and for a breach of its obligations under article 7. 1, unless the shipper proves that such loss or damage is caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which a diligent shipper was unable to prevent". In general, the Draft Instrument considered the distinction between dangerous and non- dangerous cargoes as being out of date. Moreover, the criterion as whether the goods were carried with or without the carrier's consent has become irrelevant under art. 7 (6), unlike art. IV (6) of the Hague- Visby Rules.[67] The balance between the shipper's liability and the carrier's liability, under the Draft Instrument, is that any damage resulted from the nature of the cargo should fall on the shipper, while any damage caused by improper handling or through the carriage should fall on the carrier.

The answer to the question of whether the shipper's liability in relation to dangerous cargo would be transferable to a holder of a negotiable transport document or a transferee of a negotiable electronic record, under art. 12 (2) (2), depends on the interpretation of art. 7 (1 & 6). On the one hand, the CMI Outline Draft, by virtue of art. 1 (19), defines the 'shipper' as "a person who enters into a contract of carriage with a carrier". On the other hand, art. 7 (1) provides that

> "Subject to the provisions of the contract of carriage, the shipper shall deliver the goods ready for carriage and in such condition that they will withstand the intended carriage, including their loading, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or

[67] The Hamburg Rules also made the carrier's consent irrelevant as precondition for imposing liability on the shipper for the loss or damage caused by the goods.

> trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the indented carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage".

It seems, therefore, that the combined effect of both art. 7 (1 & 6) and art. 1 (19) is to qualify the shipper's obligation, not to ship dangerous cargo, as a personal obligation and the liability of a breach of such obligation as only of the shipper. However, the consignor, defined by virtue of art. 1 (3) as "a person that delivers the goods to a carrier for carriage", may become liable, under art. 7 (6), by virtue of art. 7 (7), for the shipment of dangerous cargo. Article 7 (7) provides that when "a person identified as shipper in the contract particulars, although not the shipper as defined in article 1. 19, accepts the transport document or electronic record, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter and under article 11. 5".

The commentary to this article identifies three parties who might fall within its provisions because of being identified as "shipper" in the contract provisions. The first is an FOB seller who 'usually complies with the requirement of this article 7.7 in that the seller is mentioned as shipper in the document and has accepted the document. . . . In addition, if a negotiable document is issued, the seller becomes the first holder and has all the rights and liabilities of a holder, including the right of control. If a non- negotiable document is issued, such an FOB seller has the right of suit as per article 13. . . .'.[68] The second is an agent who is mentioned as shipper in the shipping document. The commentary states that this situation '.... can only arise when such agent, expressly or impliedly, is authorised by the shipper (as defined) to be such 'documentary shipper'. If such agent accepts the document, its position is the same as outlined above with respect to

[68] See (U.N. Doc. A/CN.9/WG.III/WP.21) at para. 121. This commentary would, presumably, apply equally to CIF seller who had contracted with a time charterer on the basis that a shipowner's bill of lading would be issued to it.

the FOB seller. Its alternative course is not to accept the document'.[69] Thirdly, there is 'the person who actually delivers the goods to carrier in cases where such person is a person other than those mentioned under (1) and (2)'.[70] The definition of 'consignor' in art. 1 (3) includes such a person. Such a consignor's only right is to obtain a receipt according to art. 8 (1) and therefore, he assumes no liabilities under art. 7 (7) or under art. 11 (5). Article 9 (3) (i) renders invalid any cesser clause insofar as it relates to any liability imposed on the shipper, or other party caught by art. 7 (7).

As a result, the holder of a negotiable transport document or the transferee of a negotiable electronic record, under the Draft Instrument, would probably not be liable to the carrier in respect of loss or damage caused by the shipment of dangerous cargo. This conclusion is supported by the following definition of the 'holder' under art. 1 (12)

> "a person that (a) is for the time being in possession of a negotiable transport document or has the exclusive [access to] [control of] a negotiable electronic record, and (b) either: (I) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed, or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof, or (iii) if a negotiable record is used, is pursuant to article 2. 4 able to demonstrate that it has [access to] [control of] such record".

As to the 'consignee' who is defined, by virtue of art. 1 (2) as "a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic record", that party would not be liable for the shipment of dangerous cargo under art. 7 (6), unless that consignee is defined as the shipper in the transport document or the electronic record, by virtue of art. 7 (7), and accepted such document or record. This is because such consignee would be considered as the shipper's agent who, expressly or impliedly, is authorised by the shipper to be the documentary shipper.

---

[69] See (U.N. Doc. A/CN.9/WG.III/WP.21) at para.122.
[70] See (U.N. Doc. A/CN.9/WG.III/WP.21) at para. 119.

However, where a negotiable transport document or a negotiable electronic record contains a clause, which defines the 'Merchant' as to include among others, the shipper, consignor, holder, consignee etc., and states that the 'Merchant' bears the shipper's responsibilities under the carriage contract, this might cause a problem in the sense that it might make the shipper's liability for the shipment of dangerous cargo transferable to such a third party. This argument might be supported the words of art. 12 (2) (2) which might give a statutory effect to any standard clause which imposes any or all of the shipper's obligations under art. 7, in particular the obligation as not to ship dangerous cargo, on such holder or transferee. It is arguable, therefore, that any clause imposing any or all of the shipper's obligations on the holder of a negotiable transport document or the transferee of a negotiable electronic record would be effective, but without any appealing justification.[71] This conclusion is also supported by the commentary on art. 12 (2) (2) which states that "This may be particularly important if the carrier and shipper have agreed that certain liabilities, which otherwise would have been the shipper's liabilities, shall (also) be assumed by a later holder".[72] Nullifying these standard clauses by virtue of art. 17 (a) of the Draft Instrument is doubtful since such standard clauses might not be considered as contractual stipulations with the effect of increasing the liability for any breach of the consignee's obligations under the Draft Instrument. This is because the effect of such clauses is to make the consignee liable to the obligations under art. 7 in addition to the shipper. This can be supported by art. 7 (7) of the Rules which allows a person who is not identified as a shipper according to art. 1 (19) to be subject to the shipper's responsibilities

---

[71] For the supporting view, see the comments on text of UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc. A/CN.9/WG.III/WP.21/Add.1, (15- 26 April 2002), (Hereinafter U.N. Doc. A/CN.9/WG.III/WP.21/Add.1) at para. 127. The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

[72] See (U.N. Doc. A/CN.9/WG.III/WP.21) at para. 199.

under art. 7 of the Rules, provided that person is identified as a shipper in the contract particulars.

However, in the absence of a standard clause which extends the shipper's responsibilities to other parties such as the holder of a negotiable transport document or the transferee of a negotiable electronic record, neither the holder nor the transferee would be liable to the carrier for any of the shipper's obligations embodied in art. 7, in particular for shipping dangerous cargo.

3. 4. 2. LIABILITY FOR FREIGHT

3. 4. 2. 1. Liability for Freight under s. 3 (1) of the 1992 Act

Broadly speaking, the shipper would initially be liable to pay the freight to the carrier, since the payment of the freight is a personal liability and falls upon the person who contracted with the carrier performing the carriage contract. Nevertheless, the shipper might be acting as an agent on behalf of his principal which would not make him personally liable to the freight but the person on whose name the carriage contract was made with the carrier, such as the consignee. The shipper's liability to pay the freight would not cease with the endorsement of the bill of lading to a consignee or an endorsee. This is because s. 3 (3) of the 1992 Act reserved the continuity of the shipper's liabilities, including his liability for the freight, as an original party to the carriage contract. However, an endorsee or a consignee would also become liable to the pay the freight to the carrier where the requirements of s. 3 (1) of the 1992 Act were satisfied.[73] Complex contractual schemes might complicate the issue of whom liable to pay the freight to the carrier, in particular where there is either a voyage or a time charter- party. Clausing the bill of lading, however, by the words "freight pre- paid" might create an estoppel in favour the

---

[73] For more detail see Boyd, S., *supra* fn. 45 at p. 345; art. [172]; Wilson, J. F., *Carriage of Goods by Sea*, 4th Edition., Longmam/ Pearson Education 2001, at p. 289 and Colinvaux, R., *supra* fn. 60 at para. 1748.

consignee or the endorsee, preventing the shipowner from claiming the freight due under the bill of lading. The rule of estoppel was considered in two cases; *Cho Yang Shipping Co. Ltd. v. Coral (UK) Ltd.*,[74] and *India Steamship Co. v. Louis Dreyfus Sugar Ltd. (The Indian Reliance)*[75]

As between the shipper and the shipowner, the inclusion of the words "freight pre-paid" in the bill of lading does not prevent the shipowner from claiming the freight from the shipper, if it is due and has not been paid. However, the shipper who takes a "pre-paid" bill of lading might not be liable for the freight, if the shipper was not under a contractual liability to pay the shipowner the freight. This is because the inclusion of these words, whilst not conclusive evidence that the freight has been paid, is, nonetheless, an important part of the evidence as to whether the shipper ever undertook to pay freight. This issue was considered by the Court of Appeal in *Cho Yang Shipping Co. Ltd. v. Coral (UK) Ltd.*,[76] where the shipper, Coral, contracted with Nortrop for the shipment of containers of sugar. Nortrop contracted with Interport who also contracted with EOS as agents of the shipowners. Interport failed to pay the freight due under their contract with the shipowners and so they sued Coral, as the named shipper in their bill of lading, for the freight due under their contract with Interport. At first instance, Hallgarten QC held that Coral and all other parties involved were acting as principals and Coral was the shipper under the bills of lading contracts. Furthermore, he denied Coral the entitlement to rely upon the rule of estoppel on the ground that the words "freight pre- paid" would not prevent the shipowners from claiming the freight from the shipper, if it has not in fact been pre- paid. Therefore, Coral was liable to pay the bill of lading freight to the shipowners.

Hobhouse L J in the Court of Appeal disagreed with the first judgment on the basis that

---

[74] [1997] 2 Lloyd's Rep. 641.
[75] [1997] 1 Lloyd's Rep. 52.
[76] See *supra* fn. 74.

> "In my judgment the Judge came to the wrong conclusion and asked himself the wrong question. He did not ask himself whether it was to be inferred that Coral had agreed to pay freight to the plaintiffs. He did not take adequate account of the fact that the bill of lading is only evidence of the contract between the shipper and the carrier which has been made before the goods were shipped nor of what terms and what agreement were to be inferred from what had happened prior to shipment. He asked himself the question whether there was anything in the bill of lading to *preclude* liability. He should have asked whether having regard to the facts of this particular shipment it is to be inferred that Coral were undertaking to the plaintiffs that they would pay freight to them".[77]

Looking at the facts surrounding the shipment, the Court of Appeal held that Coral never agreed to pay freight due under the contract between the shipowners or EOS and Interport, since all the parties were acting as principals not as agents. Also, EOS only knew that Coral required a freight pre- paid bill of lading which would be issued against Interport's undertaking to pay the freight within the agreed period of credit. Therefore, the Court of Appeal held that Coral was not liable contractually to pay the freight to the shipowners. Therefore, an endorsee or a consignee in a situation like *Cho Yang* case would not be liable, by virtue of s. 3 (1) of the 1992 Act, on the ground that the initial consignor has undertaken no liability to pay freight and so there would be no freight liability to be transferred to a third party holder of the bill of lading under s. 3 (1) of the 1992 Act.

The inclusion of the words "pre- paid" into the bill of lading which incorporates the provisions of either the head charter or the sub- charter makes the issue of who is liable to pay the freight more complex, as seen in *India Steamship Co. v. Louis Dreyfus Sugar Ltd. (The Indian Reliance)*.[78] The shipowners, India Steamship Co. Ltd., time chartered the vessel to Cosemar who sub- chartered the vessel to the sub- charterers, Louis Dreyfus, under a voyage charter. The payment of the freight, under the shipowners' bills of lading, would be according to the provisions of the sub- charter "FREIGHT PAYABLE AS PER CHARTER PARTY". The sub- charter provided that an advance freight of 95% to be paid

---

[77] *Ibid.* at 645.
[78] See *supra* fn. 75.

to the charterers and the freight was paid to a designated bank account in the charterers' name by the sub- charterer. As a result of the time- charterers' failure to pay the shipowners, the latter asked the sub- charterers to pay the freight due as a condition of continuing the voyage to Alexandria and discharge the cargo. The sub- charterers refused to pay and the issue was resolved by an agreement between themselves as to discharge the cargo at its destination with preserving the parties' legal rights. Rix J., as to the words "freight prepaid", held that the sub- charterers who were named as the endorsees could not rely upon the rule of estoppel on the basis that "They were, after all, parties to the sub-charter and knew whether that freight had been made or not".[79] In contrast, it is likely therefore that the holder of the bill of lading who is not party to the charter would be able to rely on the rule of estoppel as to defeat the shipowner's claim for freight under s. 3 (1) of the 1992 Act. This is because that holder is neither party to the charter nor knew of whether the outstanding freight had been in fact paid or not.[80]Reliance on estoppel will require proof of detrimental reliance by the holder of the bill of lading. It is important to note that as the bill of lading incorporated the terms of the charter- party there was no issue, as in the *Cho Yang* case, as to whether the original consignor had ever undertaken to pay freight. Accordingly, the 'freight repaid' clause was analysed solely from an estoppel perspective.

As to the issue of whether the payment of the freight which was made by the sub-charterers would discharge their liability to the shipowners under the bill of lading, Rix J., held that the sub- charter's provisions as to the payment of the sub- charter freight were incorporated. This is because the words "FREIGHT PAYABLE AS PER CHARTER

---

[79] *Ibid.* at 55.

[80] For the shipper's liability for the freight under the bill of lading which includes the words "freight pre-paid" see Baughen, S., "Does a 'freight prepaid' bill of lading mean what it says?" [1999] Shipping & Transport Lawyer. p. 12 where he concluded that these words would prevent the shipowner from claiming the freight from the shipper who is not a party to the charter under s. 3 (3) of the 1992 Act on the basis of the rule of estoppel.

PARTY" did not define only the rate of freight but also the manner of payment as to when, where and to whom freight is payable.[81] Therefore, a bill of lading which incorporates the provisions of the charter would make the holder of the that bill contractually liable to the shipowners for the payment of the freight. On the one hand, if the bill of lading incorporates the head charter, the payment of the freight to the shipowner will discharge the holder of the freight liability but not the payment to the sub- charterer. Lloyd J., in *The Constanza M*,[82] held that the payment of the freight to the sub- charterer would not discharge the consignee or the shipper where the shipowners' bill of lading incorporates the head charter rather than the sub- charter. This is because the sub- charterer could not be considered as the shipowners' agent unless he has express, implied or ostensible authority to receive the bill of lading freight on behalf of the shipowners. On the other hand, if the bill of lading incorporates the sub- charter, the payment of the freight to the sub- charterer will discharge the holder of the bill from liability and prevent the shipowner from claiming the freight again from the holder of the bill of lading. Rix J., was prepared to extend the principle which provides that the payment of the freight to the shipowner's agent would be payment to the shipowner as to the payment of the freight to the charterer under the sub-charter which would discharge the bill of lading holder's liability to the shipowner.[83]

3. 4. 2. 2. Liability for Freight under the Draft Instrument

Article 9 (3), provides that

> "(a) Unless otherwise agreed, the shipper is liable to pay the freight and other charges incidental to the carriage of the goods. (b) If the contract of carriage provides that the liability of the shipper or any other person identified in the contract particulars as the shipper will cease, wholly or partly, upon a certain event or after a certain point of time, such cessation is not valid: (i) with respect to any liability under chapter 7 of the shipper or a person mentioned in article 7. 7; or (ii) with respect of any amounts payable to the carrier under the contract of carriage, except to the extent

---

[81] See *supra* fn. 75 at 58.
[82] [1980] 1 Lloyd's Rep. 505 at 514.
[83] See *supra* fn. 75 at 56.

> that the carrier has adequate security pursuant to article 9. 5 or otherwise for the payment of such amount. (iii) to the extent that it conflicts with the provisions of art. 12. 4".

Under art. 9 (3) (a), the shipper would initially be liable to pay the freight and other outstanding charges relating to the carriage contract. Under art. 9 (3) (b) (ii), the party identified as the shipper in the contract particulars would remain liable to pay any amount payable to the carrier under the carriage contract, even if this party never agreed contractually to pay. Therefore, clausing the negotiable transport document or the negotiable electronic record by the words "freight pre- paid" would not prevent the shipowners from claiming the freight from the party identified as the shipper, by virtue of art. 9 (4) (a). In contrast, the Court of Appeal in *Cho Yang shipping Co. Ltd., v. Coral (UK) Ltd.*,[84] held, looking at the facts surrounding the shipment, that the named shipper, Coral, in the bill of lading was not liable contractually to pay the freight to the shipowner. The combined effect of both art. 9 (3) (b) (ii) and art. 9 (4) (a) would clearly be difficult to justify and it would reflect US law rather than English law after *Cho Yang shipping Co. Ltd., v. Coral (UK) Ltd.*[85]

On the other hand, art. 9 (4) provides that

> "(a) If the contract particulars in a transport document or an electronic record contain the statement "freight prepaid" or a statement of a similar nature, then neither the holder nor the consignee, is liable for the payment of the freight. This provision does not apply if the holder or the consignee is also the shipper. (b) If the contract particulars in a transport document or an electronic record contain the statement "freight collect" or a statement of similar nature, such a statement puts the consignee on notice that it may be liable for the payment the freight"

Article 9 (4) (a) reflects the principle that the holder or the consignee who is not the party identified as the shipper should be allowed to rely conclusively against the carrier on the statement in the transport document or the electronic record which provided that the

---

[84] See *supra* fn. 74.
[85] *Ibid.*

freight has been pre- paid. However, art. 9 (4) (a) would not provide such protection to the party identified as the shipper. It is not clear whether or not this would also cover a non-contracting consignor. The liability of such a party in relation to dangerous cargo is expressly provided for in art. 7 (7) but no equivalent provision exists in art. 9. However, it is possible that such a party could still be regarded falling within the definition of 'shipper' provided in art. 1 (19), by virtue of an implied contract. On this analysis, art. 9 (4) (a) would reverse the decision of the Court of Appeal in *Cho Yang Shipping .v. Coral (UK) Ltd.* Article 9 (5) (b) provides that the statement "freight collect" would have the effect of putting the consignee or the holder on a notice that he may be liable for the payment of freight. However, it is entirely not clear as whether a statement "freight payable as per charterparty" would have the effect of putting the consignee or the holder on a notice that he may be liable for the payment of freight and so would make the consignee or the holder liable to pay the freight, even if the sale contract provided that the freight should have been paid by the shipper, seller. Therefore, the holder or the consignee might be liable to pay the freight by suitable incorporation of the charter- party provisions into the bill of lading, which would also reflect the position under US law. This is because the holder's liability for the payment of the freight, by virtue of art. 9 (4) (b), depends on the terms of the bill of lading. In contrast, art. 16 (4) of the Hamburg Rules provides that in the absence in the bill of lading of any indication that the freight is payable by the consignee or the holder of the bill, a proof to the contrary by the carrier is not admissible when the bill has been transferred to a third party, including the consignee, who in good faith has acted in reliance on the absence of such indication. However, this issue is solved under English law by the decision of the court in *India Steamship Co. v. Louis Dreyfus Sugar Ltd., (The Indian Reliance).* Therefore, a bill of lading which incorporates the provisions of the charter

would make the holder of that bill contractually liable to the shipowner for the payment of the freight.[86]

3. 5. TRANSFERRING OF LIABILITIES UNDER US LAW

Ch. 801 makes the bill of lading a safe document to deal with, by attaching the rights of suit to that document, but the tradability of the bill of lading is impaired by leaving the transferee with indeterminable liabilities. Therefore, the transferee's liabilities would be determined under American law by the common law rules, in particular those relating to implied contract. Despite the fact that the implied contract device has only been used to imposed liability on receivers, the evidence from which a promise to pay has been implied has been widen that it now make sense to talk of common law liabilities rather than implied contract.

American courts have applied the common law rules which made the transferee liable for charges which he knew nothing about.[87] Therefore, a bank which takes the bill of lading as security would not be able to calculate the risk which runs with its security, if it needs to have recourse to the goods, since it might be faced with liability for the carrier for any other outstanding charges. Moreover, the transferee would be liable to outstanding charges embodied in the charterparty, even where the bill of lading made no reference to them.[88] Also, the transferee would potentially be liable for the freight, even though the bill states that it had been prepaid.[89] However, the transferee would be able to estop the carrier from denying that the freight had been paid, if he proved that he had relied upon it, unlike the consignor who would be unable to satisfy the requirement of reliance as in *Cho Yang Co., Ltd., v. Coral (UK) Ltd.* Under American law, the carrier will not be estopped from

---

[86] See *supra* fn. 75.
[87] *USA .v. Ashcraft - Wilkinson Co., The Vittorio Emmanuele III*, [1927] A. M. C. 872.
[88] *Amerada Hess .v. S. S. Plillips Oklahoma*, [1983] A. M. C. 1528.
[89] *Ivaran Lines and Farovi Shipping Corp. v. Sutex paper and Cellulose Corp.*, [1987] A. M. C. 690.

claiming the freight against the transferee by merely the words "freight prepaid". The transferee must also show it relied upon these words. In contrast, under English law, the words "freight prepaid" have full effect in respect of the relationship between the carrier and the consignee or endorsee as part of the bill's of lading terms. The Court of Appeal, in *Cho Yang Co. Ltd.*, v. Coral (UK) Ltd.,[90] gave full effect to the words "freight prepaid" in the bill of lading, at least, where the bill does not incorporate the terms of the charterparty. Because the words show that the consignor did not agree to pay freight, they do not take effect by way of estoppel, with its requirement of reliance, as is the case under American law. Thus, both the consignor and any third party holder of the bill would be in a better situation under English law rather than under American law.[91]

The divergence from English law has recently been accentuated by the decision of the Court of Appeals for the Sixth Circuit in *Contship Containerlines, Inc. v. Howard Industries, Inc.*[92] where they concluded that the shipper would be liable for the payment of the freight, for the second time, to the carrier on the basis of an implied contract in law. Howard contacted Transworld, freight forwarder agent, to arrange for the transportation its cargo from Houston- Texas to Syria. Howard had delivered its cargo directly to vessel and had paid Transworld the freight due to Contship, the carrier. Bills of lading listed the cargo and specified the shipping charges but were unsigned. Contship brought an action for the non- payment of the ocean freight for three shipments of chemical products shipped by Howard on board its vessel. The Court of Appeals for the Sixth Circuit held that the undisputed facts are sufficient to establish the necessary elements of an implied contract in law rather than in fact. An implied contract in law may exist based on principles of equity and to prevent unjust enrichment, even when a "meeting of the minds" does not occur.

---

[90] See *supra* fn. 74.
[91] However, the holder of the bill of lading, under English law, could be responsible for charges embodied in other document, such as charterparty, where there is suitable incorporation in the bill of lading itself.
[92] 309 F. 3d 910 (6th Cir. Nov. 4, 2002).

Those facts were, the direct delivery of the goods by Howard to Contship and the transportation of those goods exactly as Howard wished by Contship.[93] Therefore, the concept of an implied contract in law can arguably be used to make the transferee of a Bolero bill of lading liable to the carrier for charges such as freight under such bill.

As to the obligation not to ship dangerous goods, the American COGSA 1936 is regarded as a negligence- based statute and so negligence would be considered as precondition for incurring liability.[94] In *Serrano .v. U.S. Lines Co.*,[95] the shipowners were denied the right to be paid by the shipper for what he had paid to the injury claimant on the basis of the absence of an actual fault on the shipper's part by virtue of art. IV (3) of COGSA 1936. Therefore, the application of art. IV (6) was not raised and so the interrelation between art. IV (6) and art. IV (3) was not considered. Also, in *Williamson .v. Compania Anonima Venezolana de Navigacion*,[96] in which the goods were considered as dangerous cargo by virtue of art. IV (6), the issue of whether art. IV (6) was subject to art. IV (3) was neither raised nor considered. Furthermore, In *General S.A., General Traders Enterprises and Agencies .v. P. Cosorcio Pesquero del Peru S.A.*,[97] the shipowners were denied the right for indemnity on the basis of the absence of fault or negligence on the shipper's part by virtue of art. IV (3), even though the goods were considered as dangerous cargo according to art. IV (6). In this case, the shipowners had consented to the shipment of the goods with his knowledge of their dangerous character. The issue of whether the shipper's obligation not to ship dangerous cargo under art. IV (6) is reduced by virtue of art. IV (3) was not an issue. It seems therefore that one could argue that the issue of the

---

[93] *ibid.* at 914.
[94] Sukhninder, P., "The Shipment of Dangerous Goods and Strict Liability" International Company and Commercial Law Review [1998] 1 at 6 and *Excel Shipping Corporation .v. Sea Train International SA*, 584 F. Sup 734 [1984].
[95] [1965] A.M.C. 1038.
[96] [1971] A.M.C. 2083.
[97] [1974] A.M.C. 2343.

interrelation between art. IV (6) and art. IV (3) under American law was not considered in any of the above cases, and so the issue still waits to be decided.

Recently, the Court of Appeals for the Second Circuit in *Senator Linie GmbH & Co. KG v. Sunway line, Inc., et al*,[98] considered the question of whether the shipper is strictly liable under s. 1304 (6) of COGSA for damages and expenses resulting directly or indirectly of inherently dangerous cargo when neither the shipper nor the carrier had actual or constructive pre- shipment knowledge of the goods' dangerous nature. In construing the wording of s. 1304 (6), the court held that "The only reference to 'knowledge' in [that section] implicates the carrier. A plain meaning approach would suggest that it is the carrier's knowledge of the goods' dangerous nature, not the shipper's, that conditions shipper liability".[99] However, the court noted that such conclusion would be inconsistent with the general rules of s. 1304 (3) of COGSA which sets forth a basic fault- based theory of the shipper liability. Moreover, the court criticised previous American decisions relating to dangerous cargoes or injurious events aboard ships as having been ".... surprisingly silent on the interplay of ss. 1304 (3) and 1304 (4)" and then held that "In any event, courts in the United States simply have not examined the text of s. 1304 (6) either on its own terms or in the light of its history and policy".[100] Among these cases are, *Serrano .v. U.S. Lines Co.*,[101] where the shipowners were denied the right to be paid by the shipper for what he had paid to the injury claimant on the basis of the absence of an actual fault on the shipper's part by virtue of art. IV (3) of COGSA 1936. Therefore, the application of art. IV (6) was not raised and so the interrelation between art. IV (6) and (3) was not considered.

---

[98] 291 F. 3d 145, 2002 AMC 1217 (2d Cir. May 12, 2002).
[99] *ibid.* at 154.
[100] *Ibid.* For a contrary view see Sukhninder, P., "The Shipment of Dangerous Goods and Strict Liability" International Company and Commercial Law Review [1998] 1 at 6, where he notes that the obligation not to ship dangerous goods, the American COGSA 1936 is regarded as a negligence- based statute and so negligence would be considered as precondition for incurring liability. See, also, *Excel Shipping Corporation .v. Sea Train International SA*, 584 F. Sup 734 at 747 (E.D.N.Y 1984).
[101] 238 F. Supp. 383 at 388 (S.D.N.Y 1965).

Another such case is *Williamson .v. Compania Anonima Venezolana de Navigacion,*[102] where the goods were considered as dangerous cargo by virtue of art. IV (6), but the issue of whether art. IV (6) was subject to art. IV (3) was neither raised nor considered. Furthermore, in *General S.A., General Traders Enterprises and Agencies .v. P. Cosorcio Pesquero del Peru S.A.*,[103] the shipowners were denied the right for indemnity on the basis of the absence of fault or negligence on the shipper's part by virtue of art. IV (3), even though the goods were considered as dangerous cargo according to art. IV (6). In this case, the shipowners had consented to the shipment of the goods with his knowledge of their dangerous character.

These cases were reviewed by English courts in cases such as *The Giannis NK* [104] and the *Athanasia Comninos.*[105] However, conflicting conclusions were reached concerning the position under American law, despite the fact that the interrelation between art. IV (6) and art. IV (3) of COGSA 1936 was not in issue in any of them.[106] Nevertheless, there is a suggestion that the shipper's obligation not to ship dangerous cargo, under American law, is qualified by art. IV (3) and so the shipper would not be liable without actual fault or negligence.[107] However, the Court of Appeals for the Second Circuit in *Senator Linie GmbH & Co. KG v. Sunway line, Inc., et al,*[108] noted that its conclusion is in line with the House of Lords' decision in *The Giannis NK.*[109] Moreover, the court refused the shipper's argument that one of the purposes of COGSA had been to codify the pre-

---

[102] 447 F. 2d 1339 at 1341 (2d Cir. 1971). See, also, *Excel Shipping Corporation .v. Sea Train International SA*, *ibid.*

[103] [1974] AMC 2343.

[104] See *supra* fn. 38.

[105] See *supra* fn. 61.

[106] See both Mustill J., in the *Athanasia Comninos*, *ibid.* at 281, and Lord Steyn J., in *The Giannis NK*, [1998] 1 Lloyd's Rep. 337 at 347, agreed that American law have taken the view that art. IV (3) qualifies art. IV (6) of COGSA 1936. In contrast, Lord Lloyd of Berwick *The Giannis NK*, [1998] 1 Lloyd's Rep. 337 at 342, argued that Mustill J., conclusion in the *Athanasia Comninos* was based on incorrect reading to the American cases.

[107] See Wilford, M., Coghlin, T., and Kimball, J., *Time Charters*, 4th Edition., LLP London, New York, Hamburg and Hong Kong: Lloyd's of London Press Ltd., 1995, at 169 and 174 where Kimball argues that the shipper's obligation under art. IV (6) is reduced by art. IV (3).

[108] 291 F. 3d 145 at 156- 157, 2002 AMC 1217 (2d Cir. May 12, 2002).

[109] See *supra* fn. 38.

existing general maritime law of the United States and then added that "COGSA legislators appear to have been more intent on preserving the international consensus embodied in the language of the Hague Rules, and getting carriers and shippers to agree to that language, than on codifying particular rules of general maritime law as expressed in U.S. case law".[110] The court, also, noted that COGSA cannot have been intended to codify pre-existing maritime law on the shipper's dangerous- goods liability since the decisions at that time were inconsistent and stated that "To sum up, we concluded that the nature of a shipper's dangerous- goods liability under general maritime law in the United States was not firmly settled in 1936".[111] Finally, the court held that to the extent that pre- COGSA decisions are inconsistent with the provisions of COGSA, such decisions are pre- empted to the extent that the provisions of COGSA govern such a claim.[112]

The Court of Appeals for the Second Circuit's decision in *Senator Linie GmbH & Co. KG v. Sunway line, Inc., et al*,[113] in respect of the inter- relation between ss. 1304 (3) and 1304 (6), as the two provisions have separate and distinct roles to play in COGSA's allocation of risk between shippers and carrier, may place such strict liability on the transferee of the bill of lading. It was argued before that the shipper's obligation not to ship dangerous cargo, under art. IV (6) of the Hague and Hague- Visby Rules, should be a personal obligation. Therefore, one could argue that making the transferee of a bill of lading liable to the carrier under s. 1304 (6) would be undesirable and unacceptable. This is because it would place the shipper in a better situation since the transferee would not be

---

[110] See *supra* fn. 108.
[111] *Ibid.* at 166. However, Benedict suggests that "Prior to the enactment of the carriage of Goods by sea Act, it was held that while the shipowner impliedly warrants that his ship is fit for the voyage, and will not injure the cargo, there was no corresponding warranty on the part of the cargo owner that his goods will not injure or delay the ship", 2A *Benedict of Admiralty*, para. 99 at 9- 14 (2000).
[112] *Ibid.* at 168. However, the court agreed with Benedict's suggestion that the enactment of s. 1304 (6) of COGSA replaced the common law rule of non- strict liability for the shippers of dangerous cargoes. 2A *Benedict of Admiralty*, para. 99 at 9- 14 (2000).
[113] 291 F. 3d 145 at 156- 157, 2002 AMC 1217 (2d Cir. May 12, 2002).

able to satisfy the requirement of non- responsibility set out in that section and therefore this conclusion should still be applicable even if s. 1304 (6) is not qualified by s. 1304 (3).

3. 6. THE SHIPPER'S LIABILITY UNDER S. 3 (3) OF THE 1992 ACT

It was argued before the Law Commissions that the holder of the bill of lading should not be liable to the carrier in respect of the carriage contract because the carrier may always enforce the carriage contract against the shipper, as the original party to that contract, and he has also a possessory lien over the goods against the holder of the bill for certain charges. A separate contract, under *Brandt .v. Liverpool*, could also come into existence between the carrier and the holder of the bill of lading by releasing the shipowner's lien and delivery of the goods without payment of those charges. The Commissions decided, however, that any limitation on the types of claim for which liability was to be imposed on the holder of the bill of lading and other documents, such as demurrage incurred prior to the issue of the document in question, would be impracticable and undesirable. Receivers should be aware of this potential liability and therefore, they should try to protect themselves by suitable conditions in the sale contract. Thus, it is arguable that fairness requires that the liability of the shipper as original party should be extinguished as well as his rights which are extinguished by virtue of s. 2 (5) of COGSA 1992. The reason for that is the shipper would not be allowed to set up a defence of set-off based on any breach of the carriage contract.[114]

---

[114] It has been noted that set-off is not permitted against claim of freight in *Bank of Boston and Connecticut .v. European Grain & Shipping Ltd*, [1989] 1 All ER. 545. Also, see Bradgate, R., & White, F., "The Carriage of Goods by Sea Act 1992" [1993] 56 MLR 188 at 204.

Moreover, under s. 3 (3) the ability of the shipper to rely on clauses such as choice of law[115] is not clear since the Commissions argued that such a clause would be difficult to characterise as one conferring rights or one imposing liability.[116] It would be more just if the holder of the bill of lading were the only person to be liable to the carrier under the carriage contract contained in or evidenced by the bill of lading even if that holder chose to walk out of the carriage contract where loss of the goods was caused by an excepted peril.[117] Carriers would be aware of this potential risk and therefore, they could protect themselves by inserting a contractual term into the bill of lading to maintain the shipper's liability in such cases.[118]

In contrast, under Ch. 801, the shipper's entitlement to sue the carrier will depend upon either being the holder of the bill of lading or his ability to produce evidence that the bill has not been transferred so to give the cause of action to another person. Therefore, it is arguable, that the shipper would not be liable to the carrier, unless he is the holder of the bill of lading. Nevertheless, the shipper might be responsible for other outstanding charges where it has been mentioned in the bill of lading. The reason for that is the terms of the carriage contract between the shipper as well as the transferee and the carrier would be those contained in the bill of lading, regardless of any antecedent agreement.

---

[115] Gaskell argues that jurisdiction clause and other clauses should be classified as defences rather than positive claims and so the shipper by virtue of s. 2 (5) of the 1992 Act would be stripped of those rights under s. 2 (1) but not such defences which the shipper might have under the express terms of the bill of lading. See Gaskell ,N., *supra* fn. 40 at 4. 34.

[116] This argument has been forward by the Commissions in favour of making the holder of the bill of lading subject to a liability. See *supra* the Law Commissions Report fn. 3 at para 3. 17.

[117] Since the holder of the bill of lading would be liable to the carrier under the carriage contract by virtue of s. 3 (1), even if the carrier's failure to comply with the holder's demand is not a breach of contract, because the loss of the goods was caused by excepted peril. So, in this case the right which the holder has acquired against the carrier was no more than empty one.

[118] This suggestion has been forward by the Law Commissions as a solution for making the holder of the bill of lading liable for the pre- shipment as well as the post- shipment charges. In respect of the shipment of dangerous goods, the shipper would be liable at common law and so the carrier would not be denied redress as in *The Giannis N.K,* See *supra* fn. 38.

3. 7. SECTION 3 (1) OF THE 1992 ACT AND CHARTERER'S BILLS OF LADING

If the court decides that the bills are charterers' bills rather than shipowners' bills, the cargo owner will be liable to the charterers by virtue of the operation of s. 3 (1) of the 1992 Act. However, the positive steps, apart from making claim under the carriage contract, which would activate the operation of s. 3 (1) of the 1992 Act, would be taken from or against the shipowners rather than the charterer. Therefore, the cargo owner, in theory, would neither be liable to the charterers by virtue of s. 3 (1) of the 1992 nor to the shipowners on the ground of the absence of any contractual relationship between them, unless the court were willing to consider the shipowner as acting as the charterer's agent for the purpose of delivery. On this assumption, the charterer would be able to sue the cargo owner and pursuant to s. 3 (1) might also recover for the shipowners' losses. This is because most time charter- parties normally contain an express indemnity clause under which the charterer is to indemnify the shipowners for any losses resulting of their compliance with the charterer's orders as to the employment of the vessel.

The next question is whether the shipowners under charterers' bills of lading could sue the cargo owner directly for the loss or the damage caused to their vessel. One possibility would be for the shipowners to sue the cargo owner on the basis of the Himalaya clause whose effectiveness has been recently proven in *The Starsin* where the courts at every level held that the shipowners were independent contractors according to cl. 5 of the bills of lading. However, the effectiveness of the Himalaya clause as to enable to the shipowners to rely on jurisdiction and choice of law clauses must now be doubted as a result of the decision of the Privy Council in *The Mahkutai.*[119] More importantly, Himalaya clauses are not worded so as to give positive rights of suit to third party. A Himalaya

[119] [1996] 3 W.L.R. 1.

clause would only operate to give the shipowner a right to sue the cargo owner for dangerous cargo, if it was worded in a different way from the usual clause and if the courts were prepared to extend what is already a very artificial doctrine to this new situation. Moreover, the shipowner under a charterer's bill of lading would not be able to have rights of suit as against the cargo owner by virtue of Contracts (Rights of Third Parties) Act 1999. This is because the 1999 Act is not applicable to contract of carriage of goods contained in or evidenced by a bill of lading, by virtue of s. 6 (5) (a). Although, a third party such as the shipowner under the charterer's bill of lading would be able to rely on a Himalaya clause, by virtue of s. 1 (1) (a) and s. 1 (6) of the 1999 Act, as to avail himself of the exclusion and limitation of liability clauses into the bill of lading, this would not assist the shipowner who wished to assert positive rights under the charterer's bill of lading.

Another method for the shipowners to sue the cargo owner would be through the implied contract device. An implied contract could come into existence between the shipowners and the holder of the bill where the shipowners, in giving up their lien, make or agree to make delivery and the holder of the bill seeks or obtains delivery.[120] Nevertheless, it is arguable that the utility of the implied contract device was reduced by the Court of Appeal's decisions in both *The Aramis*[121] and *The Gudermes*,[122] though the Court of Appeal's decision in *The Captain Gregos (No 2)*[123] suggested that the implied contract device might still have a role to play. A problem is whether the shipowner could be said to have any lien to give up when delivering cargo carried under charterer's bill of lading. In any event, the cargo owner would not be liable to the shipowners for the loss or the damage caused by dangerous cargo, even if a contract was implied by the court between

---

[120] Lord Bingham J., in *The Aramis*, [1989] 1 Lloyd's Rep. 213 at 224, suggested that an implied contract on the terms of the bill of lading could come into existence where the shipowner, in giving up his lien, makes or agrees to make delivery and the holder of the bill seeks or obtains delivery.
[121] *Ibid.*
[122] [1993] 1 Lloyd's Rep. 311.
[123] [1990] 2 Lloyd's Rep. 395.

the shipowners and the cargo owner. Mustill J., in *The Athanasia Comninos*[124], *obiter*, concluded that the holder of the bill of lading could not be liable for breach of warranty as to the fitness of the goods for carriage on the basis that "There is to my mind no reason to assume, from the bare facts of presentation and delivery, that the parties intended the consignee to be made subject to a retrospective liability for acts with which he had nothing to do".[125] In contrast, the right to a *quantum meruit* freight when goods are carried under charterer's bill of lading seems to have been accepted in *The Jalamohan.*[126] But the issue was never explored given the finding that a shipowner's bill of lading had been issued. *Hain Steamship Co. Ltd. v. Tale & Lyle Ltd.*,[127] shows judicial unwillingness to imply *quantum meruit* freight when the shipowner still has an express right to recover freight under a charter- party.

Another possibility would be for the shipowners to sue the cargo owner according to the doctrines of bailment and sub- bailment on terms. This would require the courts to hold that there had been an attornment to the successor in title. Delivery of the goods would not constitute an attornment under a shipowner's bill, there is no reason why it should not do so under charterer's bill of lading. However, Colman J., held that there was no attornment on the facts of *The Starsin* so it is likely that an express attornment is required by the shipowner even when it is not the carrier under the bill of lading. What is uncertain, though, is whether an attornment has the effect of transferring liabilities of the head bailor as well as it rights of suit. Palmer[128] also notes that there is no authority as to the bailor's duty as regards the safety of goods bailed and concludes that any such duty is likely to be a due diligence one. To allow a successor in title to be liable for the bailor's breach of such duty would, in effect, be to impose a strict liability as that party would have

---

[124] See *supra* fn. 61.
[125] *Ibid.* at 281
[126] [1988] 1 Lloyd's Rep. 443.
[127] [1936] 2 All E.R. 597.
[128] Palmer, N., *Bailment*, 2nd Edition, London: Sweet & Maxwell 1991, at p. 777.

had no means of ascertaining the condition of the cargo. It is, therefore, unlikely that the courts would find such a party to be liable as sub- bailor to the shipowners.

The Draft Instrument, by virtue of art. 6 (3) (1) (a), provides that "A performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier's rights and immunities.....". Therefore, one could argue, that under a charterer's bill of lading a shipowner, as a performing party, would be able to claim against the shipper under art. 7 (1), by virtue of art. 6 (3) (1) (a), which entitles the performing party to the carrier's rights under this instrument.

3. 8. CONCLUSION

The Law Commissions found that the link between the acquisition of the contractual rights and the imposition of liabilities would be unsatisfactory, since it would make all holders of the bills of lading liable to the carrier by virtue of their being holder of the bill and so a bank which held a bill of lading as security would be liable for charges such as freight and demurrage simply because it held the bill of lading. Therefore, the holder of the bill of lading, according to s. 3 (1) of COGSA 1992, would be liable to the carrier only where the requirements of that section were satisfied.

However, the question of whether the shipper's liability for the shipment of dangerous cargo is transferable to third parties, is not settled conclusively by English courts. Nonetheless, it was argued before that the shipper's liability for the shipment of dangerous cargo should not be transferable to third parties.[129] This is because the shipper would be liable for dangerous cargo at common law and so, the carrier would not be denied redress as in *The Giannis N.K.*

However, it was argued before the Law Commissions that the holder of the bill of lading should not be liable to the carrier in respect of the carriage contract, since the carrier

---

[129] For these arguments see *supra* sub- title 3. 4. 1. 1.

may enforce the carriage contract against the shipper, as original party to that contract and has also a possessory lien over the goods against the holder of the bill for certain charges. Moreover, a separate contract, according to *Brandt .v. Liverpool*, could come into existence between the carrier and the holder of the bill of lading by releasing the shipowner's lien and delivery of the goods without payment of those charges.[130]

In contrast, Ch. 801 provides nothing about the holder's liabilities and so the holder, under American law, might be only liable to the carrier by reason of becoming the holder of the bill of lading.[131] As to the question of whether the shipper's liability for dangerous cargo is transferable to a third party is also still waiting to be decided by American courts under American law. Although the Court of Appeal for the Second Circuit's decision in *Senator Linie GmbH & Co. KG. v. Sunway Line, Inc., et al*, held, obiter, that the inter- relation between ss. 1304 (3) and 1304 (6) may place such strict liability on the transferee of the bill of lading.

A holder, under the Draft Instrument, by virtue of art. 12 (2) (1), would not assume any liability under the carriage contract solely by reason of becoming the holder which replicates the effect of s. 3 (1) of the 1992 Act. The interpretation of the provisions relating to the shipper's obligations under the Draft Instrument provide that the shipper's liability not to ship dangerous cargo is a personal liability and so it would not be transferable to third parties. However, the notes to art. 12 (2) (2) allow the original parties to the carriage contract, by suitable incorporation clause, to agree that certain liabilities, which otherwise would have been the shipper's liabilities, shall be assumed by a later holder. This contradicts the assumption in article 7 that only the shipper will be liable in respect of the

---

[130] *The Aramis*, [1989] 1 Lloyd's Rep. 213 at 224, where Bingham L. J., suggested that an implied contract on the terms of the bill of lading could come into existence where the shipowner, in giving up his lien, makes or agrees to make delivery and the holder of the bill seeks or obtains delivery.

[131] It has been observed that the carrier has no express rights against the transferee of a bill under either Ch. 801 or under the Uniform Commercial Code. See Beatson, J., & Cooper, J., "Rights of suit in respect of carriage of goods by sea" [1991] LMCLQ. 196 at 205.

shipment of dangerous cargo. Furthermore, given that the liability of the shipper under article 7 is fault based, it is uncertain how it would operate were the contract to extend the liability to third parties. Would the third party inherit the shipper's liability or would their liability depend upon their own personal fault.

The shipper's liabilities are not extinguished under s. 3 (3) of the 1992 Act. Under American law the shipper would be liable to the carrier only where he is the holder of the bill of lading. The shipper's rights of suit as well as liabilities are not extinguished under the Draft Instrument, by virtue of both art. 12 (2) (1 & 2) and art. 13 (3). This is fairer result than the current position under English law where the bill of lading shipper remains liable after transfer of the bill but is divested of rights of suit.

CHAPTER FOUR: ELECTRONIC BILLS OF LADING [1]

4. 1. INTRODUCTION

The use of the orthodox bill of lading in international commerce causes delay of the goods and, more dangerously, fraud due to the mercantile practice of issuing bills in sets of originals. The replacement of the orthodox bill of lading by the electronic bill of lading would reduce if not demolish the need for a letter of indemnity issued customarily by the time charterer or the final purchaser of the goods should delivery be made to the wrong person. It would also minimise and reduce the opportunity of taking delivery against a forged bill of lading which might lead to lengthy and costly litigation. Moreover, the quantity of paper used in each international transaction represents an enormous proportion of the price that would be reduced by replacing the orthodox bill of lading and other shipping documents with electronic equivalents.

4. 2. WHETHER AN ELECTRONIC BILL IS A DOCUMENT OF TITLE?

The electronic bill of lading is unlikely to be accepted as a document of title under the English common law. This is because the orthodox bill of lading is the only document recognised by the English common law as a document of title. Given the speed of technological innovation, recognition of electronic bills as documents of title might only take a few years. However, this process might arguably take longer compared to other

---

[1] Caplehorn, R., "Bolero.net- Provides New Legal Framework for Electronic Trade" [1999] S & T.L.I. 12, Richardson, J., "At the Cutting Edge" [1999] S & T.L.I. 14, Nilson, A., "Bolero- An Innovative Legal Concept" [1995] 6 Comps. & Law 17, Burden, K., "EDI and Bills of Lading" [1992] 8 C.L.S.R. 269, Chuah, J., "The Bolero Project- the International Chamber of Commerce's electronic bill of lading project" [2000] Student Law Review 56, Livermore, J., and Euarjai, K., "Electronic Bills of Lading and Functional Equivalence" [1998] 2 J.I.L.T., <http://elj.warwick.ac.uk/jilt/ecomm/98_2liv/>, Emerson, V., "The Concept of Negotiability and the Electronic Bill of Lading- An Overview" [2001] 3 J.E.C.L. & P. 10, Mallon, P., and Tomlinson, A., "Bolero: Electronic 'Bills of lading' and electronic Contracts of Sale" [1998] I.T.L.Q. 257, Bond, R., "The Future of Electronic Commerce in International Trade" [1999] I.T.L.Q. 15 and Todd, P., "Dematerialisation of Shipping Documents" [1994] J.I.B.L. 410

documents which have been in use for a much longer time, such as a combined bill of lading. Therefore, any attempt to substitute the orthodox bill of lading with the electronic bill of lading should produce a contractual solution whereby the functionality of the orthodox bill of lading is replicated for the electronic bill of lading. However, the Law Commission Advisory Report on 'Electronic Commerce: Formal requirements in Commercial Transactions'[2] anticipated the existence of adequate 'contractual' schemes such as Bolero system reduce the need for immediate domestic reform relating to the carriage of goods by sea. A sea waybill in its electronic form represents no more than information which can be easily, speedy and cheaply be transmitted electronically by computerising system or international trade data communication. A sea waybill is not a document of title under English common law and so an electronic sea waybill would cause no problem since it is no more than information transmitted electronically rather than a proof of entitlement to the goods. However, the replacement of the orthodox bill of lading by the sea waybill or other non- negotiable documents would not be appropriate in cases such as oil cargo which is typically sold and resold many times during transit.

A related aspect of the acceptance of the electronic bill of lading as a document of title is the requirement of the common law rules of that such a document must be signed and as to whether an English court would accept the electronic authentication as equivalent to signature. However, art. 7 (1) of the Electronic Communication Act 2000 provides that

> "(a) an electronic signature incorporated into or logically associated with a particular electronic communication or particular electronic data and; (b) the certification by any person of such a signature, shall each be admissible in evidence in relation to any question as to the authenticity of the communication or data or as to the integrity of the communication or data".

---

[2] Electronic Commerce: Formal Requirements in Commercial Transactions- Advice from the Law Commission, December 2001. The full text is available on the net; http://www.lawcom.gov.library.

Despite the fact that electronic signatures are admissible in legal proceedings, their validity would still be left for the court to decide on a case by case basis as to whether the electronic signature was used correctly and what weight it should be given against other evidence in relation to the authenticity and the integrity of the communication or data. However, digital signatures such as those incorporated into or associated with Bolero bills of lading would arguably be admissible before English courts since they would satisfy the requirement of art. 7 (1) of the Electronic Communication Act 2000 relating to the authenticity and the integrity of the communication or data.[3] Moreover, an express agreement between the parties involved in the carriage contract relating to the validity of a digital signature would not be affected by the provisions of the Electronic Communication Act 2000 such as the agreement between all the users of the Bolero system embodied in the Bolero Rulebook as not to assert paper- based writing and signature against each other in any litigation under the Bolero Rulebook.

An orthodox bill of lading is no more than information recorded in a paper medium[4] and so the concepts of "delivery" or "endorsement" or "possession" which are related to the function of the bill of lading as a document of title would cause no legal or practical problems. The only advantage of using a medium of paper is its inherent security against being tampered with. However, employing cryptography technology to provide high level of security to all transactions in order to prevent tampering with the data and to deny unauthorised access can satisfy this advantage. Under the Bolero system, the Bolero.net acts as a certification authority; an independent third party, to issue digital certificate to each user which confirms to the recipient that the public key used to sign the

---

[3] This view is supported by Electronic Commerce: Formal Requirements in Commercial Transactions- Advice from the Law Commission, December 2001, at para. 3. 31 on Digital Signature and at para. 3. 39. The acceptance of a digital signature is based on satisfying the statutory function requirement of demonstrating an authenticating intention of the signatory rather than the form requirement.

[4] For more details see Digital Signature in the Bolero System, 1999 Bolero International Ltd., at http://www.bolero.net/decision/legal/legal and Caplehorn, R., "Bolero.net- The Global Electronic Commerce Solution for International Trade", [1999] 14 B.J.I.B. & F.L. 421.

message was in fact the one issued to the sender. The result of the message being encrypted by the private key would be compared with the message being decrypted by the public key to decide whether the message has been tempered with or changed in transmission. Moreover, the 'Title registry' records electronically all changes in the right to possession of the goods which are the subject of the Bolero bill of lading as the goods are sold in transit.

Section 1 (5) of the 1992 Act empowers the Secretary of State to make provisions for the application of the 1992 Act to "cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to (a) the issue of a document to which this Act applies; (b) the endorsement, delivery or other transfer of such a document; or (c) the doing of anything else in relation to such a document". Also, s. 5 (1) of the 1992 Act defines information technology as to "include[s] any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form". Accordingly, the information can be recorded in a non- paper medium, as in the case of the electronic bill of lading, without being reduced to documentary form. Therefore, the concepts of "delivery" or "endorsement" or "possession" in relation to the electronic bill of lading should be considered differently and by comparison with the function of the orthodox bill of lading as a document of title. This is because s. 1 (6) (a) of the 1992 Act empowers the Secretary of State to make modifications to the provisions of the 1992 Act which are "appropriate in connection with the application of this Act to any case mentioned" in s. 1 (5) of the 1992 Act. As a result, the concept of possession in relation to the electronic bill of lading should not and could not be physical one which would also be applicable equally to both concepts of delivery and endorsement. Although, it would be a relatively straightforward matter for s. 1 (5) to be applied to the Bolero system, to date the Secretary of State has not used his

powers to do so. The status of an electronic bill of lading must therefore be ascertained by reference to the common law. Even if an electronic bill of lading were to become recognised as a document of title at common law, it is unlikely that it would be recognised as a 'bill of lading' for the purposes of the 1992 Act if the Secretary of State had not exercised his powers under s. 1 (5) of the Act. Moreover. s. 7 of the Electronic Communication Act 2000 cannot solve the problem of title to sue for bills of lading in that it cannot allow electronic bills of lading to be treated as 'bills of lading' for the purposes of COGSA 1992, even if it enables them to achieve recognition as document of title. This is because of s. 1 (5) which will allow them to come within COGSA 1992, the Secretary of State has to use his powers set out therein.

There is no authoritative definition of a document of title to the goods at common law. However, the core nature of a document of title to the goods is that it must be capable of transferring the constructive possession of the goods and may operate so as to transfer the property in them.[5] As a result of that the transferee of an orthodox bill of lading would have a constructive delivery of the goods and a proof of ownership which would allow him to have control over the goods and enable him to resell the goods to a new buyer during transit. Also, the bundle of rights locked up in the orthodox bill of lading as a document of title would be transferred to the new transferee by endorsing and delivering the bill of lading.

Carver[6] has argued that the Bolero bill of lading does not have the distinctive characteristics of an orthodox bill of lading as being a document of title. But it is equally arguable that the Bolero system was not striving to create a new document of title but rather to achieve the essential negotiability of a document of title through its function using electronic messages; the Bolero bill of lading. The Bolero bill of lading achieves the

---

[5] See Guest, A. G., (*et al*) *Benjamin's Sale of Goods*, 6th Edition, Sweet and Maxwell, 2002, at para. 18- 176.
[6] *Carver on Bills of Lading*, 1st Edition, London: Sweet and Maxwell 2001, at para 8- 086.

essential negotiability of a document of title through a novation of the carriage contract and the common law concept of attornment. Therefore, the constructive possession and the rights to take delivery of the goods under the Bolero bill of lading are transferred from the transferor to the transferee by a form of attornment by deeming that the Bolero is the carrier's agent for that matter. The requirement that notice must be given to the carrier, which was a hundred years ago impractical, under the Bolero bill of lading should not affect its ability to achieve the essential negotiability of a document of title, in the light of the improvement in communication during the last ten years. Moreover, the transferee of the Bolero bill of lading would have a new and a separate contractual relationship with the carrier by way of novation of the carriage contract. Novation under the Bolero system[7] will eliminate the need for an exception to the doctrine of privity, such as provided by the Bills of Lading Act 1855 and the Carriage of Goods by Sea Act 1992. The consent requirement of all the parties involved in the process under novation would not affect the bundle of rights or obligations of the parties involved and so the result would be the same whether these rights are transferred by virtue of the 1992 Act or acquired by way of novation. From the foregoing, one could argue that the Bolero bill of lading has achieved the essential negotiability of a document of title by becoming the functional equivalent of the orthodox bill of lading. This is because the essential negotiability of a document of title, which is the subject of the transaction, is being transferred rather than the paper or the electronic message, which is only the medium.

Another voluntary code is to be found in the CMI Rules which are discussed in more detail in the following section.[8] Like the Bolero system, they will be applicable only if the parties to the carriage contract agree so, by incorporating them into their contract.

---

[7] Novation under the Bolero system will be considered in sub- title 4. 6.

[8] See UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc. A/CN.9/WG.III/WP.21, (15- 26 April 2002), (Hereinafter U.N. Doc. A/CN.9/WG.III/WP.21) The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

One of the most important difference between CMI Rules and the Bolero system is that the former provide for a private registry[9] system controlled by the carrier for electronic messages while the latter provides for a central registry, the so called 'Title Registry', controlled by an independent third party. Having an independent third party rather than the carrier to control and verify the electronic messages, Bolero bills of lading in the case of Bolero system, should prove more acceptable to the cargo owners since it would prevent the carrier from tampering with the terms of the carriage contract and the representations relating to the goods. This is because the carrier's involvement under the orthodox bill of lading would only be restricted to the issuing of that bill and collecting the cargo. Therefore, the Bolero system provides a strong security control and procedures to protect the integrity and confirm the authenticity of electronic messages, Bolero bills of lading, in particular by the use of digital signature.

The Bolero system provides a set of rules in the 'Bolero Rulebook'.[10] These have only a contractual effect and their application depends on express agreement as to their use. The Bolero Rulebook governs the validity of the electronic transactions and the legal effect of the Bolero bills of lading. However, one of the most important draw backs of the Bolero system, unlike CMI system where it is open to anyone to use, is that it is a locked system in which all the interested parties should be members and have signed an undertaking to abide by the rules set out in the Rulebook. Therefore, the novation of the carriage contract and the common law concept of attornment would not be a conceivable solution to the transferee that is not a member of the Bolero system. The feasible solution to this problem is to issue a paper bill of lading to that transferee as to trigger the current

---

[9] See art. 7 of the CMI Rules for Electronic Bills of Lading produced by the Comite Maritime International [1990] at http://www.comitemaritime.org/rulesebla.html. However, this issue is left to the 'Rules of Procedure' between the carrier and the shipper according to art. 2 (4) of CMI Draft Outline Instrument on Issues of Transport Law at http://www.uncitral.org/en-index.htm.

[10] For the full text of the Rulebook of the Bolero System see Bolero Association at http://www.boleroassociation.org/downloads/rulebook1 or http://www.boleroassociation.org/dow-docs.htm.

regulation governing the orthodox bill of lading. However, issuing an orthodox bill of lading would undermine the commercial rationale behind any initiative to dematerialise the shipping documents such as the Bolero system. The retention of the orthodox bill of lading was one of the major reasons for the failure of the Seadocs scheme[11] beside the absence of any provision for transferring the contractual rights and liabilities to the holder apart of the original shipper.

4. 2. 1. THE CMI RULES ON ELECTRONIC BILLS OF LADING

In 1990 the CMI published its 'Rules for Electronic Bills of Lading'. The CMI Rules do not have the force of law and are entirely voluntary. This is because a set of voluntary rules was thought to be more appropriate than a convention, which would take many years to establish and be very difficult to modify. Moreover, the system of the CMI Rules on Electronic Bills of lading is open to anyone to use, unlike the Bolero system, and so there is no need for the parties to be members of a group.

The CMI Rules preserve the full functionality of the paper bill of lading; receipt, contract, title, insurance verification and documentary credit verification. To fulfill all those functions, several messages are required under the CMI Rules, unlike the paper bill which fulfils all those functions on a single piece of paper. However, the end result would be the same. One of the essential elements of the CMI Rules is the use of the 'private key' to replace the transfer of a paper bill. However, the function of the 'private key' is merely to verify the message and was never intended to provide security for the message. Therefore, other means of security such as digital signatures would still be needed. The other essential element is the 'private registry', which leaves the risk and duty of delivery

---

[11] The main rationale behind Seadocs scheme was to avoid delay by lodging the paper bill of lading with a central registry while the ownership of the goods would be transferred electronically. Under Seadocs scheme cargo owners and banks would only be able to check the bill of lading through the central registry, if requested to do so. This practice would arguably undermine one of the purposes of using an electronic bill of lading which is reducing if not demolishing fraudulent bills of lading.

with the carrier under the CMI Rules. This would allow the carrier to have more direct communications and so reduce the risk of non- delivery.

The CMI Rules on Electronic Bills of Lading has many disadvantages. First, the CMI Rules provides no specific provisions as regards the transfer of contractual rights and liabilities along with the documentation. Therefore, the contractual rights would only be with the original shipper, unlike the Bolero System. However, a new contract might spring up between the new holder and the carrier when the right of control and transfer is accepted. Secondly, a holder who has accepted the right of control and transfer, but who has not paid for the goods, should have all the rights, against the carrier, in the goods after a transfer, otherwise a subsequent holder who has paid would have obtained no security of any value. However, this problem can be solved by an express term in the sale contract, in line with s. 19 (3) of the Sale of Goods Act 1979, requiring the buyer to re- transfer the right of control and transfer to his seller in the event of non- payment and reserving a right of disposal in the goods until paid. Thirdly, the CMI Rules provide no provision for the passing of property in the goods. However, this problem can also be solved an appropriate provision in the sale contract regarding the passing of property. Finally, the CMI Rules seem comparatively insecure against fraud. This is because it is quite difficult to provide a system which is both completely open and completely secure, although either one or the other ought to be possible. One could argue that this problem might be solved by having a central registry, like the Bolero System- the 'Title Registry' controlled by an independent third party.

4. 2. 2. THE UNCITRAL MODEL LAW ON ELECTRONIC BILLS OF LADING

"In preparing the Model Law, the Commission agreed that such rules dealing with specific uses of electronic commerce should appear in the Model Law in a way that reflected both the specific nature of the provisions and their legal status, which should be the same as that

of the general provisions contained in part one of the Model law".[12] Moreover, "In preparing the Model Law, the Commission noted that the carriage of goods was the context in which electronic communications were most likely to be used and in which a legal framework facilitating the use of such communications was most urgently needed".[13] Accordingly, article 16 (Actions related to contracts of carriage of goods) of the Model Law contains provisions that apply equally to negotiable bills of lading as well as to non-negotiable transport documents and any specific document such as charter- parties. It is, also, applicable to maritime transport as well as transport of goods by other means, such as road, railroad and air transport.

Article 17 (Transport documents) of the Model Law, by virtue of (1 & 2), is intended to replace both the requirement for a written contract and the requirements for endorsement and transfer of possession of a bill of lading. Article 17 (3) of the Model Law establishes uniqueness as an absolute requirement to transfer rights by means of data messages. Such a provision would serve to validate voluntary rules for the transfer of rights in goods, such as the CMI Rules on Electronic Bills of Lading, and is an important development for such usages. Article 17 (4) of the Model Law sets the standards of reliability for such messages, while article 17 (5) addresses the fundamental need to avoid the risk of duplicate transport documents. Therefore, paper- based communications for ancillary messages and electronic communications for bills of lading cannot be used concurrently, otherwise uniqueness would be destroyed. Article 17 (6) ensures that if a cargo conventions, such as the Hague and Hague- Visby Rules, would have been compulsorily applicable to a paper bill of lading, had it been issued, a contract of carriage created by data messages would also be subject to such convention. Although, the

---

[12] See United Nations commission on International Trade Law (UNCITRAL)- UNCITRAL Model Law on Electronic Commerce with Guide to Enactment- 1996 *with additional article 5 bis as adopted in 1998*, at para. 108. The full text of the document is available on the net; http://www.uncitral.org.

[13] *Ibid*. at para. 110.

UNCITRAL Working Group on Electronic Commerce will continue its work and add further articles to the Model Law, its work in the maritime arena is complete.

4. 3. AN ELECTRONIC BILL OF LADING AND THE DRAFT INSTRUMENT

Article 1 (9) defines 'electronic record' so as to cover electronic signature "information attached or otherwise linked to the electronic record contemporaneously with" and to include electronic endorsement "subsequent to its issue by the carrier or a performing party". Also, art. 2 (4) provides that an electronic record should perform the typical document of title functions by allowing the record to be indorsed electronically, identifying the ultimate receiver of the goods to whom the carrier is obliged to deliver the goods without the need of a paper bill of lading and describing the manner in which the record would be exhausted. Under art. 12 (1) (2), the rights incorporated into a negotiable electronic record would be transferred to the new holder provided that the negotiable electronic record passed according to the rules of procedure referred to in art. 2 (4) of the Rules. These rights are the right of control embodied in art. 11 including the right to demand delivery of the goods at their destination embodied in art. 11. Also, by virtue of art. 12 (2) (2) the holder of a negotiable electronic record who exercised any right under the carriage contract would assume any liabilities imposed under the carriage contract to the extent that such liabilities are incorporated in or ascertainable form the negotiable electronic record. Therefore, by virtue of art. 12 (2) (1) the holder of a negotiable electronic record would not be liable merely by reason of being the holder of a negotiable electronic record and should not also be liable for the shipper's liabilities specified in art. 7 (1 & 3) such as those in respect of dangerous cargo.[14] However, in the absence of a standard clause which extends the shipper's responsibilities to other parties such as the

[14] However, there is a possibility that those liabilities may be imposed on third parties by express contractual provision. For more detail see sub- title 3. 4. 2. 2. of chapter 3.

holder of a negotiable electronic record, the holder of that record would not be liable to the carrier for any of the shipper's obligations embodied in art. 7, in particular for shipping dangerous cargo.

In contrast, the Bolero system provides for a novation of the carriage contract to the transferee via the Rulebook. Accordingly, a contract between two parties is extinguished and an identical contract is created between one of the parties and a third party. Therefore, it operates as a complete transfer of the rights and liabilities under the contract from one person to another. The report prepared by Allen & Overy and Richards Butler for Bolero International Limited,[15] states that novation in the Rulebook "will replicate the system established by the English- based bills of lading legislation".[16] However, this statement can be challenged on the basis that the provisions of COGSA 1992, governing the orthodox bill of lading, established a statutory assignment rather than a novation of the carriage contract. This is because the contractual rights of suit, under s. 2 (1) of the 1992 Act, are transferred to and vested in the lawful holder of a bill of lading as if he had been a party to the carriage contract, while the contractual liabilities would only be transferred to and vested in that holder where the requirements of s. 3 (1) of the 1992 Act were satisfied. Therefore, the holder of the bill of lading, under s. 3 (1) of the 1992 Act, would not be liable to the carrier merely by reason of being the lawful holder of the bill of lading. The position is the same under art. 12 (2) (2) of the Draft Instrument. In contrast, with a novation, the transferee of the Bolero bill of lading would be liable to the carrier by virtue of being the transferee of the Bolero bill of lading. As regards the shipper's liabilities under the carriage contract, these are reserved both by virtue of s. 3 (3) of the 1992 Act and by virtue art. 3 (5) (3) of

---

[15] For the full text of the report prepared by Allen & Overy and Richards Butler, London, for Bolero International Limited, operators of the Bolero System titled "International Legal feasibility Report", 2nd Edition, November 1997 (updated August and December 1999) at http://www. bolero.net/decision/legal/legal.php3 or http://www. bolero.net/content/search/library.

[16] See the report prepared by Allen & Overy and Richards Butler, at p. 72.

the Rulebook of the Bolero system. With respect to the conclusion made by Nicoll[17] who concluded that the Bolero system emulates the legislation model by ensuring that the shipper's obligations to the carrier are retained despite the transfer of the Bolero bill, one could argue that the transferee of the Bolero bill of lading would be liable for the shipment of dangerous goods[18] as well as for the freight, unless it contained a clause to the effect that 'freight pre- paid' in particular after *Cho Yang Shipping .v. Coral (UK).*[19] This is because the legal effect of novation is to operate as a complete transfer of the rights and liabilities under the contract, the carriage contract, from one person to another. This line of argument is supported by the statements embodied in the report prepared by Allen & Overy and Richards Butler for Bolero International Limited,[20] which state that "The carrier's interest in a transfer of these liabilities of the shipper to a new BBL Holder is to retain an acceptable source of recovery so that the identity of the BBL Holder is significant" and "Where a BBL contract of carriage is novated, it would appear that the carrier's position is little different from a novation achieved by English- based bills of lading legislation". In contrast, the consignor of a negotiable electronic record which contained a clause to the effect that 'freight pre- paid' under the Draft Instrument by virtue of art. 9 (4) (a) would be liable to pay the freight.[21] Moreover, the transferee of a negotiable electronic record under art. 9 (4) (b) might be liable to the carrier for the freight where the record provided for freight to be paid 'as per charterparty', although the freight under contract between the transferee and the shipper should have been paid by the shipper, on the ground that "such a statement puts the consignee on notice that it may be liable for the payment of the freight".

---

[17] Nicoll, C. C., "BOLERO Makes the Bill of Lading Obsolete" [1999] Int.M.L. 148 at p. 151.
[18] For more detail about the shipper's liable for the shipment of dangerous cargo under the common law and the Hague- Visby Rules and whether this liability is transferred to a holder of the bill of lading under s. 3 (1) of the 1992 Act and the CMI Outline Draft see chapter three under sub- title 3. 4. 1.
[19] [1997] 2 Lloyd's Rep. 641.
[20] See the report prepared by Allen & Overy and Richards Butler at p. 73.
[21] For more detail about the holder's bill of lading liability for freight under s. 3 (1) of the 1992 Act and the Draft Instrument see chapter three under sub- title 3. 4. 2.

4. 4. THE BOLERO SYSTEM AND THE HAGUE- VISBY RULES

The Draft Instrument would govern the rights and the obligations of all the parties involved in the carriage contract, carriers, shippers, transferees and others. This is because their aim is to provide a comprehensive and a complete scheme. In contrast, the Bolero system via art. 3 (2) (4) of the Rulebook provides that "A contract of carriage in respect of which the carrier has created a Bolero Bill of Lading shall be subject to any international convention, or national law giving effect to such international convention, which would have been compulsorily applicable if a paper bill of lading in same terms had been issued in respect of that contract". Accordingly, any international carriage convention or any national law giving effect to such international convention would be applicable to the carriage contract covered by a Bolero bill of lading where that particular voyage is covered by the relevant convention as if it would have been compulsorily applicable if a paper bill of lading in the same terms had been issued in respect of that contract. However, the Hague or Hague-Visby Rules, by virtue of art. I (b), are only applicable to carriage contracts covered by a paper "bill of lading or any similar document of title". Also, as mentioned before, the Bolero system was not striving to create a new document of title but rather to achieve the essential negotiability of a document of title through its function by using an electronic bill of lading. Section 7 of the Electronic Communication Act 2000 might qualify the Bolero bill of lading or any other electronic bills of lading as documents but more importantly it would not qualify them as documents of title. Evidently, the Hague or Hague- Visby Rules would not be applicable to the Bolero bill of lading or any other electronic bill of lading and more importantly they would not have the force of law even if the particular carriage contract adopts these Rules contractually.

Could, however, the contractual adoption of these Rules be acceptable under the English law and before English courts? The answer to this question is important because

art. 2 (5) (2 & 3) of the Rulebook of the Bolero system provides that "This Rulebook is governed by and shall be interpreted in accordance with English Law" and "Where the sole matter at issue between the parties is a claim for non- compliance with or breach of this Rulebook, all proceedings in respect of such claim shall be subject to the exclusive jurisdiction of the English courts". As said before, the Bolero system is trying to achieve the essential negotiability of a document of title through its function by using an electronic bill of lading. Also, the Bolero system via the Rulebook intends that the Bolero bill of lading would and should have the same effect as a paper bill of lading. This intention presents itself in art. 3 (1) (3) of the Rulebook which states "any statement a Carrier makes as to the leading marks, number, quantity, weight, or apparent order and condition of the goods in the BBL Text will be binding on the Carrier to the same extent and in the same circumstances as if the statement had been contained in a paper bill of lading" and therefore, art. III (3 & 4) of the Hague- Visby Rules relating to the evidential effect of the carrier's statement would be applicable to the Bolero bill of lading.

One could, therefore, argue, like others,[22] that the application of the provisions of the Hague- Visby Rules to the Bolero bill of lading would not cause any public policy objections. This is because the Bolero bill of lading or any other electronic bill of lading is not regulated, until now, by either the Parliament or the Secretary of State by virtue of s. 1 (5) of the 1992 Act. Moreover, English courts would arguably show respect to this commercial practice since a similar commercial practice was the motivation behind extending the application of the Hague- Visby Rules to a non- negotiable document by virtue of s. 1 (6) (b) of COGSA 1971. Establishing that English courts would accept the contractual adoption of the provisions of the Hague- Visby Rules, COGSA 1971, all users of the Bolero system would be denied to plea that the language used by the Rules, relating

[22] Nicoll, C. C., "BOLERO Makes the Bill of Lading Obsolete" [1999] Int.M.L. 148 at p. 150 and Clarke, M., "A black Letter Lawyer Looks at Bolero" [1999] I.T.L.Q. 69 at 71.

to information to be 'noted' in art. III (7) or 'inserted' and 'embodied' as in art. IV (5) (a) & (f) or 'embodied' as in art. V, can only be compatible with the paper bill of lading. This is because this information can be recorded electronically in the Bolero bill of lading and its admissibility in any legal proceeding would be governed by s. 7 of the Electronic Communication Act 2000. Moreover, electronically recording such information into the Bolero bill of lading should not have the effect of a covenant relieving the carrier or the ship from liability or lessening such liability which is forbidden by virtue of art. III (8) of the Hague- Visby Rules. Also, the application of the Hague- Visby Rules to the Bolero bill of lading should be in substance rather than form as terms incorporated in the carriage contract. This conclusion is also emphasised by art. 3 (2) (4) of the Rulebook which provides that "In the event of a conflict between the provisions of any international convention or national law giving effect to such international convention and other provisions of the contract of carriage as contained in BBL Text, the provisions of that national law or international convention shall prevail".

4. 5. THE BOLERO SYSTEM AND THE HAMBURG RULES

The question of whether the Hamburg Rules would be applicable to the Bolero bill of lading or any other electronic bill of lading is less urgent because of the absence of a widespread recognition of the Rules. However, the Hamburg Rules, by virtue of art. 1 (6), are applicable to any carriage contract "whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another". Also, art. 1 (7) of the Rules defines a bill of lading as "a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such undertaking". Moreover, art. 14 (3) of the Rules allows the bill of lading to be signed

electronically as states "The signature on the bill of lading may be in handwriting, printed in facsimile, performed, stamped in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading issued". It is right to argue that the draftsmen of the Hamburg Rules have not anticipated the application of the Rules to an electronic bill of lading such as Bolero bill of lading. But, it equally right to argue that a bill of lading can not be signed electronically unless the whole document is in an electronic form such as the Bolero bill of lading. Therefore, this argument can be used to support the application of the Hamburg Rules to the Bolero bill of lading.[23] However, if this argument is not accepted, art. 18 of the Rules provides that "Where a carrier issues a document other than a bill of lading to evidence the receipt of the goods to be carried, such a document is *prima facie* evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described". Thus, if a bill of lading signed electronically would be governed by the Rules, other documents which are signed electronically should also be governed by the Rules. Accordingly, the Bolero bill of would be governed by the Hamburg Rules since it is no more than a document signed electronically in accordance with arts. 14 and 18 of the Rules.

4. 6. NOVATION AND IMPLIED CONTRACT

As has been said before, the Bolero system solves the problems of privity through the novation of the carriage contract. Accordingly, a new contract would emerge and therefore, under English law, the consent of all parties should be obtained and a consideration should be provided. The requirement of consent would be satisfied via the electronic messages and the involvement of the 'Title Registry' as the carrier's agent in the electronic equivalent of endorsement. However, the requirement of consideration would not be met

---

[23] For opposite view see Nicoll, C. C., *ibid.* at p. 149 in 48 fn. 1.

unless the transferee of the Bolero bill of lading is obliged to pay freight or some other outstanding charges such as demurrage. The absence of any of these charges would therefore undermine the workability of the novation as a mechanism of transferring the contractual rights to the transferee under the Bolero bill of lading under English law. However, the consideration requirement was considered by English courts in many cases dealing with the implied contract doctrine and the outcome of these reduced the need for compliance with this requirement. The Court of Appeal in *The Aramis*[24] held that "Once an intention to contract is found no problem on consideration arises, since there would be ample consideration in the bundle of rights and duties which the parties would respectively obtain and accept". Moreover, it was held, in *The Captain Gregos (No. 2)*,[25] that the active co- operation between the BP and the crew of the vessel was enough to imply contract between BP and the shipowners as "to give business reality to the transaction between them and create the obligations which, as we think, both parties plainly believed to exist". It is arguable therefore that an analogy might be drawn by the English courts so as to be less rigid with the consideration requirement in the case of novation of the carriage contract, for the same reasons as to give business reality and to give effect to underlying commercial convenience.[26]Also, under novation the mutual exchange of promises could constitute a consideration between the transferee and the carrier.

Another issue relating to the novation of the carriage contract under the Bolero system is the maintaining of the original shipper's liabilities under art. 3 (5) (3) of the Rulebook. Chitty states that "It should, however, be noted that the effect of a novation is not to assign or transfer a right or liability, but rather to extinguish the original contract and

---

[24] [1989] 1 Lloyd's Rep. 213 at 225.
[25] [1990] 1 Lloyd's Rep. 395 at 403.
[26] For more detail about commercial convenience and commercial specialty see Clarke, M., "A black Letter Lawyer Looks at Bolero" [1999] I.T.L.Q. 69 at 76- 78.

to replace it by another".[27] One could argue, therefore, that the shipper could plead before an English court that the effect of novation is to extinguish the original carriage contract between himself and the carrier and so he should not be liable to the carrier for the shipment of dangerous cargo under art. 3 (5) (3) of the Rulebook. The shipper would be able to challenge the validity of art. 3 (5) (3) on the ground of art. 2 (5) (2 & 3) of the Rulebook of the Bolero system which provides that "This Rulebook is governed by and shall be interpreted in accordance with English Law" and "Where the sole matter at issue between the parties is a claim for non- compliance with or breach of this Rulebook, all proceedings in respect of such claim shall be subject to the exclusive jurisdiction of the English courts". Establishing that the Bolero system solves the problem of privity through the novation of the carriage contract would allow the English court to decide the effect of that novation in accordance to the English law. Therefore, it is arguable that the decision of the court would be in favour of the shipper and so to invalidate any maintaining of the original shipper's liabilities such as in respect of the shipment of dangerous cargo.

Nonetheless, if both the requirement of consideration and the rigid application of that requirement by English courts undermined the application of the novation of the carriage contract adopted by the Bolero system, the doctrine of implied contract might arguably provide a possible solution to the problems of privity. Under the doctrine of implied contract, a contract would be implied from the conduct of both the consignee and the carrier. The involvement of the 'Title Registry' of the Bolero system as the carrier's agent in the electronic equivalent of endorsement does seem to place the Bolero situation closer to the facts of *The Captain Gregos (No. 2)*[28] than to those of *The Aramis*.[29] This is because in *The Captain Gregos (No. 2)*, BP neither paid the freight or undertook to pay it,

---

[27] See the Common Law Library, *Chitty on Contracts,* 28th Edition, Vol. One, General Principles, London: Sweet and Maxwell 1999, at para. 20- 086.
[28] See *supra* fn. 25.
[29] See *supra* fn. 24.

nor was there evidence that BP knew that the freight was outstanding. Also, BP neither presented the bills of lading to the shipowners to take delivery nor undertook to do so latter. These facts would arguably support the present of a contractual intention and therefore the delivery of the goods to the transferee of the Bolero bill of lading by the carrier would not be consider as a performance of a pre- existing obligation. However, Faber [30] argues that this line of argument is unlikely to be upheld on the ground that "The carrier would be already be obliged under his contract with the original shipper to use these electronic messages to pass the right of control and transfer. Therefore, in themselves, they are unlikely to provide a basis for an implied contract". But, it is arguable that the carrier is not obliged to use electronic messages to pass the right of control and transfer under the carriage contract with the original shipper but rather via the Rulebook of the Bolero system. If this argument is accepted, the transferee of the Bolero bill of lading might not be liable for the shipment of a dangerous cargo on the ground that the obligations created by the doctrine of implied contract are limited to "those rights and obligations which concern the carriage and delivery of the goods, and payments therefor".[31] Moreover, the existence of art. 3 (5) (1) (3) of the Rulebook which provides that "The immediately preceding Holder- to- order's rights and liabilities under its contract of carriage with the Carrier shall immediately cease and be extinguished" would ensure that the intermediate parties are divested of rights and liabilities provided that the rights of control were transferred to a new transferee of the Bolero bill of lading.

Finally, it should be noted that the provisions of Contracts (Rights of Third Parties) 1999 Act are not applicable to a carriage contract embodied into an electronic bill of lading, by virtue of s. 6 (6), on the ground that this bill is included by the provisions of the 1992 Act. However, the application of the 1992 Act to this document is, by virtue of s. 1

---

[30] See Faber, D., "Electronic Bills of Lading" [1996] L.M.C.L.Q. 232, fn. 25 at 243.
[31] See *The Athanasia Comninos and Georges Chr. Lemos*, [1990] 1 Lloyd's Rep. 277 at 281.

(5), conditional on regulations made by the Secretary of State. No such regulations have yet been made.

4. 7. ELECTRONIC BILLS OF LADING UNDER US LAW

An electronic bill of lading is a document that is electronically transmitted and digitally signed.[32] Article 2- 201 (1) of UCC establishes the requirement of writing for certain contracts and signature. Accordingly, a party who attempts to enforce the contract should introduce evidence of a signed writing document. On the one hand, article 1- 201 (39) of UCC defines "signed" as "any symbol executed or adopted by a third party with the present intention to authenticate a writing". On the other hand, article 1- 201 (46) of UCC defines 'writing' as to include "printing, typewriting or any other intentional reduction to tangible form". As a result, article 2 of UCC does not recognise any electronic document, including an electronic bill of lading, unless it is reduced to a signed paper. However, article 2 of UCC is under revision by the National Conference of Commissioners on Uniform State Laws and the drafting committee has anticipated some changes that reflect the importance of electronic contract formation and digital signatures.

COGSA in its current form applies, by virtue of s. 1303 (b), only to a bill of lading and any similar document of title insofar as it relates to contract of carriage of goods by sea. Electronic bills of lading would not be considered as documents of title so as to be governed by the current COGSA's provisions. This is because the definition of a document of title under art. 1- 201 (15)[33] of the Uniform Commercial Code does not include an electronic bill of lading as a document of title. Moreover, an electronic bill of lading could

---

[32] See Livermore, J., & Euarjai, K., "Electronic Bills of Lading: A Progress Report" (1997) 28 J. Mar. L. & Com. 55.

[33] Article 1- 201 (15) defines a "document of title" as to include "bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass".

not be considered as a negotiable document of title, by virtue of art. 7- 104 (a)[34] of the Uniform Commercial Code, because the delivery and the holder definitions under art. 1-201 (14 & 20)[35] would prevent an electronic bill of lading from being in a negotiable form.[36] Accordingly, the Pomerene Act would not be applicable to an electronic bill of lading as to govern the transfer the contractual rights since it is not a negotiable bill of lading, by virtue of art. 7- 104 (a) of UCC, under Ch. 801 03.

Current US law does not deal with the issues relation to electronic bills of lading. On the one hand, the Electronic Signature in Global & National Commerce Act 2000 is not specifically directed to maritime commerce and, indeed, it does not address negotiable instruments such as bills of lading. On the other hand, the Uniform Electronic Transactions Act focuses on negotiable instruments rather than negotiable documents of title such as bills of lading.[37] Nonetheless, some states have already addressed the validity of digitally signed documents, such as the Utah Digital Signature Act 1995.[38] The Utah Act 1995 provides that digitally signed documents are as valid as signed paper documents. Accordingly, an electronic bill of lading under the Utah Act 1995 will be valid as a paper bill of lading, but such validity is limited to the State of Utah. Despite the validity of an electronic bill of lading under the Utah Act 1995, it would not be governed by COGSA as "any similar document of title". This is because such bill could not be considered as a

---

[34] Article 7- 104 (a) defines a "negotiable document of title" as "A document of title is negotiable if by its terms the goods are to be delivered to bearer or to the order of a named person".

[35] Article 1- 201 (14) defines a "delivery" as "with respect to instruments, document of title, chattel paper, or certificated securities means voluntary transfer of possession" and article 1- 201 (20) defines a "holder" as "with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession".

[36] See, also, Whitaker, David R., "Letters of Credit and Electronic Commerce" (1995) 31 Idaho L. Rev. 699 at pp. 709.

[37] For more detail see Boss Amelia H., "The Uniform Electronic Transactions Act in a Global Environment" (2001) 37 Idaho L. Rev. 275 at pp. 348- 349 and Sharpe, David B., "E- Commerce in the United States" 920010 5 Int. M. L. 160 at pp. 160 -161.

[38] The State of New York has, also, addressed the validity of a digital signature by the amendment of New York's General Obligations Law 1994. However, the amendment was limited to qualified financial contracts (QFCs), which provides that enforceable QFCs are not rendered void for a lack of a writing, if there is sufficient evidence of contracting. The State of California, also, has adopted the Transactions with Public Entities Digital Signatures Act 1994, which is limited only to transaction with a public entity.

document of title under art. 1- 201 (15) of UCC or even a negotiable document of title under art. 7- 104 (a) of UCC. Moreover, the Pomerene Act would not be applicable to such document as to govern the transfer of the contractual rights since it is not a negotiable bill of lading, by virtue of art. 7- 104 (a) of UCC, under Ch. 801 03.

COGSA is currently under discussion in the Proposed Amendments to the Carriage of Goods by Sea Act.[39] By its enactment, by virtue of s. 1 (b) of the Proposed Bill, it applies to all contracts of carriage which "includes, but is not limited to, negotiable or 'order' bills of lading and non- negotiable or 'straight bills of lading', whether printed or electronic". By virtue of s. 1 (g), the Proposed Bill applies to electronic bills of lading "If the parties agree to use an electronic bill of lading, it shall be a 'contract of carriage' governed by the Act and the procedures for such bills of lading shall be in accordance with rules agreed upon by the parties". The application of the Proposed Bill to an electronic bill of lading depends on the parties' agreement and it will only govern the parties' liabilities and rights toward each other. The Proposed Bill contains no special provisions dealing with transferring the contractual rights and liabilities under such an electronic bill of lading. Although, the Proposed Bill incorporates fifteen sections of the Pomerene Act and therefore it would, *inter alia*, contain the definitions of negotiable and non- negotiable bills of lading, it would not make the Pomerene Act applicable to an electronic bill of lading since it is neither a negotiable or a non- negotiable bill of lading under Ch. 801 03 of the Pomerene Act, nor a document of title under art. 7- 104 (a) of UCC.

As a result, article 7 of UCC is under revision by the Committee acting for the National Conference of Commissions on Uniform State Laws.[40] The aim of the revision is, as stated by the Drafting Committee, to provide a framework for the further development

---

[39] The Proposed Amendments to the Carriage of Goods by Sea Act [hereafter as the Proposed Bill] is waiting for an enactment by the Senate and House of Representative of the United States of America in Congress.

[40] For the full text of the Drafting Committee to revise Uniform Commercial Code Article 7, Document of Title see the National Conference of Commissions on Uniform State Laws- Uniform Commercial Code Article 7- Document of Title available on the web. www.nccusl.org.

of electronic documents of title and so to allow the commercial practice to determine what records issued by bailees are "in the regular course of business or financing" are "treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers".[41] The Drafting Committee has revised article 7[42] and the related articles, 1[43], 2, 5 and 9 of the Uniform Commercial Code.[44] Moreover, the Drafting Committee has revised s. 16 of Uniform Electronic Transactions Act relating to transferable record in order to make sure that the rules of article 7 provide the dominant set of rules governing electronic documents of title. On one hand, the enactment of such revision would qualify an electronic record as a document of title, where it is suitable, in the same way as a paper document of title. On the other hand, however, such an electronic record is not included by the definition of a bill of lading and so the provisions of the Pomerene Act would not govern such record. A

---

[41] See the Drafting Committee to revise Uniform Commercial Code Article 7, Document of Title at p. 10 [hereafter DC].

[42] Article 7- 102 (10) defines a "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form" and art 7- 102 (11) defines "sign" as "with present intent to authenticate or adopt a record: (A) to execute or adopt a tangible symbol; or (B) to attach to or logically associate with the record an electronic sound, symbol, or process". Article 7- 106 (a) defines control as "(a) A person has a control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred".

[43] Article 1- 201 (15) defines a "document of title" as " a record (i) that in the regular course of business or financing is treated as adequately evidencing that person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport documents, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods".

Article 1- 201 (14) defines a "delivery" as "with respect to an electronic document of title means voluntary transfer of control and with respect to instruments, tangible document of title, chattel paper, or certificated securities means voluntary transfer of possession" and article 1- 201 (20) (C) defines a "holder" as "a person in control of a negotiable electronic document of title".

[44] Section 16 of UETA (a) provides that "In this section, 'transferable record' means an electronic record that: (1) would be a note under [Article 3 of the Uniform Commercial Code] or a document under [Article 7 of the Uniform Commercial Code] if the electronic record were in writing". This part has been omitted (or a document under [Article 7 of the Uniform Commercial Code]).

potential solution to such problem is to extend the definition of bills of lading under art. 1-201 (6) of UCC[45] to include a bill of lading in an electronic form.

However, the enactment of such revision would allow the current COGSA, but not the Pomerene Act, to be applicable to an electronic record, since such record would be a document of title and so included by the definition of the contract of carriage of goods by sea under s. 1903 (b) of COGSA.

Until the Pomerene Act is extended to electronic bills of lading, users of electronic bills must strive to find solutions within the existing law. There seems to be no US equivalent to Bolero System. However, the American P & I Club is sympathetic to the aims of Bolero, and has released special circulars, titled "Paperless Trading- The Bolero Project", dealing with the Bolero Project.[46] The International Group of P & I Clubs, including the American P & I Club, has fully reviewed the Bolero System and has introduced the Paperless Trading Endorsement which would be applied to liabilities- other than those would, in any event, have arisen under a conventional paper system- arising from a document containing or evidencing a contract of carriage which has been created or transmitted under a Paperless System.[47] It is, therefore, likely that US carriers who wish to use electronic bills of lading will do so under aegis of Bolero.

Using the Bolero System in the United States raises the question of how rights and liabilities under a Bolero bill might be transferred under the existing American law. Under American law, third party beneficiaries are granted rights of suit upon contracts to which they are not privy. Using this principle, the transferee of a Bolero bill, the buyer, might be

---

[45] The revised version of art. 1- 201 (6) defines "bill of lading" as "a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt".

[46] These circulars are Nos. 21/ 98, 11/ 99 and 9/02 are available at the web: http://www.american-club.com/circulars.

[47] See circular No. 9/ 02 titled- Paperless Trading- The Bolero Project and Similar System at http://www.american-club.com/circulars/cir9-02.htm. The Clubs in the International Group are willing to cover risks created only by Bolero System.

able to sue the carrier for the loss of or the damage to its cargo on the ground that the transferor, the shipper, contracted with the carrier for the transferee's benefit whereby the carrier promised the safe carriage of the cargo to its destination. Accordingly, the transferor as contractual principal would be able to sue the carrier but only recover nominal damages for any breach of the carriage contract since it suffered no loss; while, the consignee, as a third party beneficiary of the carriage contract, would be able to sue the carrier and recover substantial damages for any breach of the carriage contract. However, American case law is divided on the privity of contract doctrine. On the one hand, "either party" cases and "the owner" cases would allow the transferee of a Bolero bill of lading to sue the carrier for any breach of the carriage contract and so it would pose no problem to such transferee. On the other hand, the "privity" cases would allow only the transferor to sue the carrier for any breach of the carriage contract so as to leave the transferee of a Bolero bill depending on the transferor's will. In this case, the transferee of a Bolero bill can avoid such a problem by stipulating, in the sale contract, that the transferor should sue the carrier for its benefit for any breach of the carriage contract.

As mentioned before, the Pomerene Act does not deal with the transfer of liabilities of the transferee of a bill of lading. The transferee's liabilities, under American law, would be determined and governed by the common law rules. Therefore, the transferee's liabilities of a Bolero bill, under American law, would need to be determined by the common law liabilities discussed in chapter three.

4. 8. CONCLUSION

It is important to note that neither the novation of the carriage contract nor the implied contract doctrine would replicate precisely the effect of COGSA 1992. This is because under the English common law rule of novation, the original shipper's liabilities should not

be maintained, even with the existence of art. 3 (5) (3) of the Rulebook of the Bolero system. Moreover, the implied contract doctrine would not provide a viable solution to a transferee in the case of non- delivery. This is because no contract could be implied between the cargo owner and the carrier in the case of total loss of the goods as in *The Aramis*.[48]

Under current US law, Ch. 801 will not be applicable to electronic bill of lading since it is not a negotiable bill under art. 7- 104 (a) of UCC. COGSA 1936 will, also, not be applicable to such bill since it is not a document of title under art. 1- 201 (15) of UCC. However, the enactment of the revision of article 7 would allow the current COGSA, but not the Ch. 801, to be applicable to an electronic record, since such record would be a document of title, but not a negotiable bill as required by Ch. 801, and so included by the definition of the contract of carriage of goods by sea under s. 1903 (b) of COGSA.

The legal issues relating to dematerialisation of the shipping documents in particular the bill of lading are complex. Any international proposal such as the Draft Instrument would be hard to achieve as a result of the traditional differences between the legal system of different jurisdictions. Therefore, an electronic commerce proposal such as the Bolero system which provides a set of contractual provisions dealing with the legal issues would be preferable one. This is because the set of contractual provisions would, speedily and cheaply, be changed or modified in the case of any unsatisfying solution to any of the relating legal issues.

---

[48] [1989] 1 Lloyd's Rep. 213.

CHAPTER FIVE: CLAIMING OUTSIDE COGSA 1992

5. 1. INTRODUCTION

The doctrine of privity of contract causes a lot of difficulties to anyone who seeks to enforce the rights and the obligations arising under bill of lading contract. Both the courts and the legislature have tried to circumvent these difficulties by various mechanisms. On the one hand, the courts have tried to resolve the problems derived from the Bills of Lading Act 1855 by different ways, such as implied contract, until the legislature intervened to fill the gap by enacting the Carriage of Goods by Sea Act 1992. But, the common law doctrine of privity of contract is still a source of problems to a set of litigants who, as a result of being outside the ambit of COGSA 1992, are trying to enforce the rights and the obligations of the bill of lading contract. On the other hand, there is a set of defendants, as a result of the exclusion of independent contractors of the ambit of COGSA 1971, who do not have contractual relationships with the cargo owner and who seek to rely on defences created by their contracts. Therefore, the courts have tried to circumvent the defendants' difficulties by applying the doctrine of bailment and sub- bailment on terms.

5. 2. IMPLIED CONTRACT

5. 2. 1. IMPLIED CONTRACT BEFORE THE ENACTMENT OF COGSA 1992

As has been argued before,[1] there are some situations where the person who suffers loss, because of the carrier's breach of the carriage contract, cannot sue the carrier, since no rights have been transferred to him by virtue of s. 2 (1) of COGSA 1992. For example, where: the buyer takes delivery against a letter of indemnity and the bill is never

[1] For these situations see *infra* sub- title 5. 5. 3.

transferred to him, as in cases such as *The Captain Gregos (No. 2)*[2]; the bill is lost in transmission and so the transferee never acquires possession of it; the bill is delivered to the buyer without the necessary endorsement, in cases such as *The Agia Skepi*[3]; the goods are sold after the bill of lading has become a 'spent' bill; the buyer takes delivery against a document which might fall outside s. 1 (1) of the 1992 Act such as, arguably, a combined transport document[4]; a pledgee takes possession of an indorsable bill of lading without being named as consignee or having the bill indorsed to him by the consignee by virtue of s. 5 (2) (b) of COGSA 1992.[5]

The utility of the implied contract theory is also needed, in cases such as the absence of an express contract between the consignor and the shipowner, which would otherwise undermine the application of COGSA 1992. The effect of s. 2 (1) is to treat the holder of the bill, or the person to whom delivery is to be made under a sea waybill or a ship's delivery order, "as if he had been a party to that contract", defined as "the contract contained in or evidenced by that bill or waybill".[6] Thus, in the absence of an express contract, a contract on bill terms needs to be implied between the shipowner and the consignor, for, otherwise there would be no contract to which the lawful could be become a party under s. 2 (1).[7]

Implied contract can also be used to resolve problems between the shipper and the shipowner where is no express contract between them. One of the reasons for the decision of Devlin J., in *Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Ltd.*,[8] was that a contract between the shipowner and the fob seller should be implied on the basis of the seller

---

[2] *Compania Portorafti Commerciale S.A. v. Ultramar Panama Inc. The Captain Gregos (No. 2)*, [1990] 2 Lloyd's Rep. 395.
[3] *Compania Continental del Peru S.A. v. Evelpis Shipping Corp.*, [1992] 2 Lloyd's Rep. 467.
[4] Also, in the case of both electronic bills of lading and merchant's delivery orders.
[5] However, a pledgee can sue the carrier where he is named as a consignee or is an endorsee, or is in the possession of a bearer bill or of a bill which is indorsed in blank.
[6] Under s. 5 (1) (a) of the 1992 Act.
[7] However, this problem also exists where the consignor has chartered the vessel from the shipowner, in which case a new contract is thought to 'spring up' when the bill of lading is transferred to a third party.
[8] [1954] 2 Q.B. 402.

presenting the goods for loading and the shipowner commencing loading. Therefore, the courts should consider an implied contract as a vital mechanism to resolve problems which are associated with some cases where the cargo owners fall outside the scope of COGSA 1992 for otherwise the cargo owners will have to recourse to tort which would undermine the implementation of the Hague- Visby Rules. However, the Act does not exclude or limit rights of suit in tort on the ground that an explicit exclusion might prevent the cargo owner from suing the carrier for loss or damage of the goods where he is unable sue under the provision of the Act.[9] Double recovery or liability would not be allowed for the same loss by the courts and the person who has contractual relationship with the carrier cannot escape the contractual terms by suing the carrier in tort.[10]

The implied contract is a valuable and flexible device which provided a means for the courts to circumvent the doctrine of privity and to enable certain classes of cargo owners who fell outside the scope of the Bills of Lading Act 1855 to establish contractual rights to sue the shipowners on the terms of the bill of lading in respect of loss or damage to their goods. The use of the implied contract was gradually extended from cases where the consignee or endorsee has presented a bill of lading and paid the freight or other outstanding charges to cases where the conduct of the parties indicated an intention to adopt and perform the bill of lading contract.

An implied contract comes into existence between the holder of the bill and the shipowner when a bill of lading is presented to the shipowner at the port of discharge and its holder obtains delivery of the goods, on the terms of that bill of lading. The leading case is *Brandt .v. Liverpool,*[11] where the shipowner was liable under the implied contract when the plaintiff, the pledgee, as an endorsee presented the bill of lading and paid the freight

---

[9] See the Commissions Report, *Rights of Suit In Respect of Carriage of Goods by Sea,* (1991) 196 Eng. LCR and 130 Scot. LCR at para. 2. 45 and 5. 24.
[10] By virtue of s. 5 (5) of COGSA 1992 and art. IV *Bis* 1 of the Carriage of Goods by Sea Act 1971.
[11] [1924] 1 K.B. 575.

then took delivery of the goods. However, whether a contract is to be implied in any particular case is always a question of fact. Therefore, whilst some judges have urged a restricted use of the doctrine of implied contract, others have been prepared to extend its application, so that the doctrine is extended to cases where the recipient of the goods was not a holder of a bill of lading but only a holder of a delivery order[12] or where the goods were delivered against a guarantee that the bill of lading would be presented as soon as that became possible.[13]

However, such a contract may not be easy to establish because there must be some consideration on either side. Therefore, in *The Aramis*,[14] the buyers sued the shipowner for short and non- delivery under two bills of lading in respect of goods forming part of a large bulk. The holder of the bill of lading No 5 could not sue the shipowner according to s. 1 of the 1855 Act because no delivery had been made under his bill and no property had passed to him upon or by reason of endorsement. Although, the holder of the bill No 6 might have been able to sue the shipowner in respect of short delivery according to the wide interpretation of s. 1 of the 1855 Act, no argument to this effect was advanced by the plaintiffs and so the Court was not called on to determine the fate of the *dictum* contained in *The San Nicholas*[15] and the subsequent cases.

However, the main issue which was discussed before the Court of Appeal was whether the holder of bill No 6 could rely upon an implied contract in the absence of the payment and acceptance of freight and, in respect of bill No 5, whether a contract could be implied where no goods at all were delivered under the tendered bill. The Court of Appeal

---

[12] In cases such as *Cremer .v. General Carriers S.A. (The Dona Mari),* [1974] 1 W.L.R. 341.
[13] *The Elli 2* [1985] 1 Lloyd's Rep. 107.
[14] [1989] 1 Lloyd's Rep. 213.
[15] Roskill, L.J., at the first instance, [1976] 1 Lloyds Rep. 8 at 13, said "I am disposed to prefer the wider view because the narrow view would in some cases at least greatly lessen the security which those advancing money against shipping documents would acquire the benefit of no contract on which they could sue the ship under the principles of *Sewell .v. Burdlick*, but would be left to sue a foreign flag shipowner in tort in any country when, where and if they could find him".

refused to imply a contract from the mere presentation of the bill of lading without any corresponding response from the carrier which would be interpreted as an acceptance of the consignee's offer. Therefore, the consignee had no remedy against the shipowner under an implied contract in respect of non- delivery. Moreover, the mere presentation of the bill of lading followed by partial delivery did not constitute sufficient evidence from which to imply a contract, especially in circumstances where the conduct of the parties is equally explicable as constituting performance of their obligations and rights under the original sale and carriage contracts and in the absence of any consideration by the party presenting the bill of lading. It is arguable that the decision of the Court of Appeal would have been different on the assumption of delivery of the whole bulk on presentation of all the bills of lading, in that the shipowner was accepting the offer made by each holder to accept delivery and to pay the freight and the other outstanding charges under the terms of the bill. Before and until the bulk was split, none of the holders knew that the bulk was short and it could not be said which of them would receive some of his goods or receive nothing at all. Therefore, the implied contract would be made with each of them at that stage and so the shipowner was in breach of the implied contract in respect of both bills by reason of short or non- delivery.[16] Therefore, there should be some kind of consideration on either side in order to infer the implication of the implied contract.[17] The problem of consideration could be resolved but, it is important to find whether there is any intention by the parties to create legal relations with each others.

---

[16] For more details see De Va, P., "More points on the *Brandt .v. Liverpool* contract, *The Aramis*", [1987] LMCLQ. 255 at 256.

[17] It is, therefore, doubtful whether an implied contract would be found where the ship sinks or where it is known and accepted that the cargo in question is not on board on arrival at the port of discharge. However, the problem of consideration could be resolved by arguing either that the carrier was not bound to deliver by virtue of his lien and provided consideration by releasing that lien as in *Scotson .v. Pegg*, [1861] 6 H. & N. 295, or the carrier's duty to deliver was owed by the shipper and the performance of a duty owed to the shipper as a third party could constitute consideration for the holder's of the bill of lading promise as in *The Eurymedon*, [1975] A.C. 154. Moreover, the implied or express promises of each party, the mutual promises, could be consideration for each other, as long as at the time of the formation of the implied contract at least one of them on each side remains unperformed.

The Court of Appeal concluded that the implied contract theory could not be applied just as a result of presentation of the bill of lading and taking delivery, as Evans, J. had held, because it would eliminate the need for the Bills of Lading Act 1855 and so the holder of the bill of lading would be always party to the bill of lading contract. [18] The Court of Appeal applied strictly the principles as to formation of contracts, ignoring previous cases such as *The Eurymedon*[19] and *Pyrene Co. Ltd. .v. Scindia Navigation Co. Ltd.*,[20] despite the fact that the reasoning in *The Aramis* could be applied equally to the facts of those cases. The court applied the doctrine of implied contract, in *The Eurymedon*, between the cargo owner and the stevedores not only because of the Himalaya clause but also on the operation of *Brandt .v. Liverpool*, despite the fact that no money had been paid to the stevedores by the cargo owner. Also, Devlin J., was prepared to find an implied contract, in *Pyrene .v. Scindia Navigation*, between the seller and the shipowner, from the seller's action in presenting the goods for loading and that of the shipowner in commencing loading. Treitel argues that "One can indeed fall back on the argument that "whether a contract is to be implied is a question of fact"; but the judgments in *The Aramis* do not take this easy way out: "whether on such facts [i.e ., those before the court] a contract may be implied must be considered in the light of ordinary contractual principles". In other words, the question *what* facts need to be established is one of law; it is only the question *whether* those facts have been established which is one of facts".[21] Therefore, the Court of Appeal should have taken into account the policy consideration of the implied contract theory which is the need to circumvent the doctrine of privity and the restrictions on the scope of

---

[18] It is arguable that the need for s. 1 of the 1855 Act would only have been reduced, but not be eliminated, because the implied contract could still be excluded by evidence of contrary intention. Therefore, the implied contract theory would be out of order if either the holder of the bill or the carrier refused to perform their obligations under the bill of lading contract. For support for this view see Treitel, G. H., "Bills of lading and implied contracts", [1989] LMCLQ. 162 at 173.

[19] [1975] A.C. 154.

[20] [1954] Q.B. 402.

[21] See Treitel, G. H., *supra* fn. 18 at 171.

s. 1 of the 1855 Act, as a way of justifying the *Brandt .v. Liverpool* contract in general terms but not to determine its scope. Moreover, Evans J., called for "authoritative reassessment" but at the same time he applied the implied contract theory. In contrast, Bingham, L.J., concluded that the solution was "to be found in an amendment of the 1855 Act along the lines now under consideration by the Law Commission, rather than in the implication of a contract where the grounds for such implication do not exist" and refused to apply the implied contract theory.

However, the Court of Appeal, in *The Captain Gregos (No2)*,[22] qualified their decision in *The Aramis* by implying a contract between BP and the shipowners, even though no money had been paid to the latter, on the ground that the discharge had been into BP's terminal which had necessitated a high degree of co- operation between the parties. Bingham L.J., found that BP's position differed from that of the plaintiffs in *The Aramis* in two respects. First, BP were the owner of the goods before discharge began and secondly, BP had clearly and explicitly consented to the carriage to be on terms which included the Hague- Visby Rules. There is no explanation regarding the link between the ownership and the conclusion of the contract at destination. Also, the consent of BP does not make the facts of the case different from the previous cases such as *The Aramis*.[23] Moreover, Bingham L.J., in the Court of Appeal found the active co- operation between the BP and the crew required the implication of a contract "to give business reality to the transaction between them and create the obligation which, as we think, both parties plainly believe to exist"[24]

---

[22] See *supra* fn. 2.
[23] Clarke, Malcolm., "The consignee's right of action against the carrier of goods by sea, *The Captain Gregos (No. 2)*" [1991] LMCLQ. 5 at 7. However, the only consent by BP was in the sale contract with B and it was not at Rotterdam.
[24] See *supra* fn. 2 at 403. It is not clear why did Bingham L J., accept the idea of giving the business reality but not in *The Aramis*.

Therefore, it is arguable that the utility of the implied contract device was reduced by the decision of the Court of Appeal in *The Aramis*,[25] but its subsequent decision in *The Captain Gregos (No 2)* suggested that the doctrine might still have a role to play, until its recent decision in *The Gudermes*[26] which renewed doubts about its utility.

The facts of *The Gudermes* are that Mitsui bought a shipment of oil from SNE who was the charterer of the defendants' vessel *The Gudermes*. Bills of lading were issued which incorporated the Hague- Visby Rules. Mitsui, the plaintiff, sold the oil shipment to ENEL who owned the receiving terminal at Ravenna. The latter rejected the cargo as a result of lack of heating on the voyage which might clog the underwater sealine at which the vessel was to discharge. In order to discharge the cargo, Mitsui arranged transhipment off Malta to another vessel with heating coils. Later, Mitsui tried to recover the cost of the transhipment and other charges from the shipowners on the ground that a contract on the terms of the bills should be implied on the basis of the extensive co- operation involved the transhipment. Mitsui could not sue the defendants by relying on s. 1 of the 1855 Act because the property in the oil passed on loading. Mitsui claimed, in the alternative, that the defendants were in breach of bailment and in breach of a tortious duty of care. The Court of Appeal held that the shipowners were bailees and they did attorn to Mitsui, but not on the terms of the bill of lading which would have required them to heat the cargo during the voyage. Instead, the bailment was on the terms of the charter, the charterer being the initial consignor, and so the bailment claim fell with the implied contract claim. In respect of the tort claim, the Court of Appeal held that the shipowners owed a duty of care to Mitsui and the shipowners' duty of care was qualified by the charterer's consent to

---

[25] Davenport also disagreed with the decision of the Court of Appeal in *The Aramis* and added "Nevertheless, the strength of English commercial law is that in the past the judges sought to give effect to good sense and underlying commercial convenience. If the judges of the past had adopted the attitude of the Court of Appeal in *The Aramis*, would we today have the letter of credit- or even the bill of exchange?" Davenport, B.J., "Problems in the Bills of Lading Act" [1989] 105 LQR 174 at 178.

[26] [1993] 1 Lloyd's Rep. 311.

carriage the goods without heating system. The key to the case was whether the transhipment operation would be considered as extensive co- operation and would lead to the implication of a contract on the terms of the bill of lading.

Hirst J., at the first instance, in *The Gudermes*[27] found that the transhipment went beyond the existing obligations of the parties and the extensive co- operation in this case was more than the one in *The Aramis*, and therefore a contract incorporating bill of lading terms should be implied.[28] Hirst J., considered the issue of implied contract in three stages: (1) it was necessary to imply a contract between Mitsui and the shipowners on the terms of the bill of lading; (2) there was an implied term in that contract that the shipowners were not obliged to heat the cargo; (3) the implied contract was governed by the Hague- Visby Rules and so the implied term was, according to art. III (8) inconsistent with other provisions in the Rules. The Court of Appeal by Staughton L.J., held that Hirst J., was wrong in considering the facts in three stages while "the issue of implied contract must be considered as a whole in one stage."[29] Staughton L.J., emphasised that "What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract."[30] The Court of Appeal agreed that there was co- operation between the parties through their direct communication with each other and through the transhipment operation which went beyond and was inconsistent with the existing rights and obligations of the parties. However, the Court of Appeal found that the co- operation was not the decisive factor and it was necessary to resolve the delivery problem.

The Court of Appeal held that the decisive factor was the defendants' refusal to accept liability for the transhipment costs "Just as one does not imply a contract from

---

[27] [1991] 1 Lloyd's Rep. 456.
[28] Hirst J., found that the intensive co- operation between the parties, as showing by the nature of the transhipment operation and the direct communication between Mitsui and the master, were more significant than the other factors such as the refusal of the shipowner to pay the transhipment costs.
[29] See *supra* fn. 26 at 320.
[30] *Ibid*.

refusal to enter into a contract, so one does not imply terms which one party has refused to accept".[31] Thus, the Court of Appeal held, according to its view of the facts of the case as whole, that there was no implied contract between the defendants, the shipowners, and the plaintiff, Mitsui. According to the facts of *The Gudermes*, there was no evidence that Mitsui accepted the defendants' refusal for liability for the transhipment costs. Nevertheless, the refusal of the defendants does not necessarily indicate the refusal to enter into a contract with Mitsui.[32] Staughton L.J., reinforced the view that the implication of a contract depends upon the intentions of the parties, while firmly stressing that such a contract is implied in fact rather than in law.[33]

The plaintiff in *The Gudermes* would now be able to sue under s. 2 (1) of the 1992 Act since the bill of lading had been indorsed to them. But, the claimant in such circumstances, might not be able to recover the cost of transhipment since it was carried out under the subsequent agreement between the shipowner and the plaintiff rather than under the bill of lading contract. However, this problem would probably be solved by suing the shipowner under the bill of lading contract for the breach of his duty of taking a proper care of the cargo or by arguing that the ship was unseaworthy and that the subsequent agreement should be regarded as mitigation of potential losses deriving from these breaches. Nor would the shipowner be able to invoke his agreement with the charterer/ shipper that the cargo did not require to be heated as this would be irrelevant as against the holder of the bill of lading.[34]

---

[31] *Ibid.* at 323.
[32] White, F., & Bradgate, R., "The Survival of the *Brandt .v. Liverpool* Contract, *The Gudermes*" [1993] LMCLQ. 483 at 487.
[33] See Treitel, G. H., *supra* fn. 18.
[34] See *Leduc .v. Ward*, [1888] 20 Q.B.D. 475.

5. 2. 1. IMPLIED CONTRACT AFTER THE ENACTMENT OF COGSA 1992

It would be tempting to conclude that the doctrine of implied contract has no role to play in filling the gaps left by the enactment of COGSA 1992. Such conclusion, however, may be too pessimistic. This is because the doctrine may still operate in the following circumstances. First, where the bill of lading is presented by a party who is the owner of the cargo at that time. The Court of Appeal in *The Captain Gregos (No 2)* gave this as one of the its reasons for implying a contract between BP and the shipowners. The implementation of s. 20 (A) of the Sale of Goods (Amendment) Act 1995 increases the range of third parties who will satisfy this condition. Such a third party might not be able to sue in negligence if the loss or damage precedes its acquisition of proprietary or possessory rights in the cargo. However, such consideration will be irrelevant if the ownership is to be the basis for implying a contract, as the contractual rights will cover any breach committed during the carrier's period of responsibility under the bill of lading. In this respect, the position resembles that under a bailment following an attornment in favour of a successor in title.

Secondly, where the discharge of the goods requires the co- operation of both the carrier and the cargo owner. This was the second reason giving by the Court of Appeal in *The Captain Gregos (No 2)* for implying a contract and has not been rendered redundant by the Court of Appeal in *The Gudermes*. What that decision has done is to qualify the factor of co- operation by disregarding it where there is a clear evidence that the carrier is clearly rejecting the terms of the proposed implied contract at the same time it is co-operating with the cargo owner.

Thirdly, Todd suggests[35] that a contract may be implied in cases involving delivery without production of a bill of lading but rather against a letter of indemnity. This is because, in doing so, the shipowner is doing something is not obliged to do under the bill of lading and therefore the parties' conduct can no longer be explained by reference to their existing contract. This line of argument might benefit third parties who take delivery against a letter of indemnity where a combined transport bill has been issued. Under such bill, whether it is a true bill of lading or a straight bill, the carrier is under an obligation to deliver only on presentation of an original bill, unlike a sea waybill. However, this argument would favour third parties who take delivery against a letter of indemnity rather than by presenting a bill of lading. Moreover, the parties' conduct in such circumstances can be explained by reference to the express contract, the letter of indemnity provided to the carrier. The letter of indemnity normally focus on the carrier's delivery obligation rather than its carriage obligations and, therefore, the existence of an express contract will tend to militate against the finding of a second, implied, contract to deal with the carrier's carriage obligations.

Fourthly, the courts might follow the example of US courts in *Contship Containerlines, Inc. v. Howard Industries, Inc.*,[36] and imply a contract in law to avoid unjust enrichment. The unjust enrichment in that case was the carriage of the goods without payment of the freight by the shipper. The unjust enrichment when a receiver takes delivery of a cargo would be the risk that, in the absence of a contractual relationship, the receiver might be able to sue in negligence without reference to the exceptions and limitations in the bill. There is also the risk that the receiver would avoid potential liabilities in the bill of lading. However, this second factor would arguably be relevant only if the liability for dangerous cargo was imposed under implied contract. For the liability for

---

[35] Todd, P., *Cases and Materials on International Trade Law*, 1st Edition, London: Sweet & Maxwell 2003, at pars. 13- 070- 13- 071.
[36] 309 F. 3d 910 (6th Cir. Nov. 4, 2002).

freight and demurrage, the carrier has a lien over the cargo and the receiver would obtain the cargo only by paying the sum due to the carrier, which would be enough for a contract to be implied under *The Aramis*.

Finally, it must be noted that the doctrine of implied contract is deficient at filling the gaps in COGSA 1992 in two aspects. First, it is unclear a contract will be implied in favour of a third party taking delivery of a cargo covered by a sea waybill, because the production of a sea waybill is not part of the process of obtaining delivery of the goods. Secondly, problems of conflicts law may arise where English law does not apply and the relevant foreign law does not recognise the implied contract theory.[37] The court in *The St. Joseph*,[38] held the implied contract will be subject to the law of the state where the goods were discharged. However, if that state does not recognise implied contracts, then it will be difficult to give effect to a clause in the bill of lading which gives jurisdiction to a state that dose recognise them, as there will be no contract for the bill of lading clauses to adhere to. The same consideration is applicable to the operation of the Hague- Visby Rules. Therefore, if the bill of lading is issued in a contracting state the Rules will have the force of law but if there is no implied contract there will be no 'contract of carriage' regulated by the bill of lading as *per* art. I (b).

5. 3. CONTRACTS (RIGHTS OF THIRD PARTIES) 1999 ACT

The Contracts (Rights of Third Parties) Act 1999, by virtue of s. 1 (3), provides that "The third party must be expressly identified in the contract by name, as a member of a class or as answering particular description but need not be in existence when the contract is entered into". Accordingly, a third party merely has to show that it fits the description of a 'third party' under this section and has acquired rights of enforcement under the 1999 Act.

---

[37] Reynolds,. F.M.B., "The significance of tort in claims in respect of carriage by sea", [1986] LMCLQ. 97 at 102.
[38] [1933] 45 Li. L. Rep. 180.

Therefore, there will be no need for that third party to prove that the contracting party was acting as an agent for the third party so as to establish a direct contractual relationship between him and the contracting party. Satisfying the requirements of s. 1 (3) will confer on a third party, who is not a party to the carriage contract, the right to enforce a term of that contract, but such right is subject to the so- called the exceptions clause s. 6 (5). Section 6 (5) provides that

> "section 1 confers no right on a third party in the case of- (a) a contract for the carriage of goods by sea, or (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by are, which is subject to the rules of the appropriate international transport convention, except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract".

The first limb of this exception relates to a 'contract for the carriage of goods by sea' which is defined in s. 6 (6) as "(a) contained in or evidenced by a bill of lading, a sea waybill or a corresponding electronic transaction, or (b) under or for the purposes of which there is given an undertaking which is contained in a ship's delivery order or a corresponding electronic transaction". Section 6 (7) provides that "(a) 'bill of lading', 'sea waybill' and 'ship's delivery order' have the same meaning as in the Carriage of Goods by Sea Act 1992, and (b) a corresponding electronic transaction is a transaction within section 1 (5) of that Act which corresponds to the issue, endorsement, delivery or transfer of a bill of lading, sea waybill or ship's delivery order". The purpose of the exception is to prevent confusing overlap between the 1999 Act and other international conventions that confer rights of suit on third parties. Without this exception, the provisions of s. 2 (5) of COGSA 1992 could be undermined by a clause drafted in conformity with s. 1 (3) of the 1999 Act. The 1999 Act could still be used to confer rights of suit on third parties claiming under sea

carriage document, such NVOCC bills, in the event that these were found to fall outsider COGSA 1992.[39]

The position is more complex where other modes of transport are involved. A combined transport bill which contains or evidences a contract for the carriage of goods *partly* by sea would not be covered by the first limb of s. 6 (5) of the 1999 Act. Therefore, a named consignee in such bill would be able to rely on s. 1 of the 1999 Act so as to enforce a term of that contract as a third party, provided that the 1992 Act only covers a bill which contains or evidence a contract for carriage of goods by sea *wholly* rather than *partly*. If the combined transport bill which covers a contract for the carriage of goods *partly* by sea and *partly* by road is not a contract for the carriage of goods *by sea*, then it doubtful if it can be classified, instead, as a contract for the carriage of goods *by road*, so as to be excluded by virtue of the second limb of the exception. Carver,[40] nonetheless, argues that such bill will still be included by the second limb of the exception where the *whole* contract for the carriage of goods covered by such bill is subject to an international convention such as CMR convention. Therefore, a combined transport bill involving road carriage that complied with s.1 (3) of the 1999 Act would still be taken out of the 1999 Act by virtue of s. 6 (5- 7), unless it fell outside COGSA 1992 but also fell outside the provisions of CMR.[41] This is likely to occur only rarely. If, say, a contract was concluded to carry goods from Birmingham to Paris, and the goods where unloaded from their trailer for the sea leg, then by virtue of art. 2 CMR, this contract would fall outside the provisions of that convention and would not, therefore, be caught by either heading (a) or (b) of s. 6 (5) of the 1999 Act. However, if the contract was from Birmingham to Warsaw, international road carriage would be involved on conclusion of the sea leg. This road leg

---

[39] But the 1999 Act cannot be used to give positive rights of suit to shipowners against the holders of Charterer's bill. Such a bill fall within the 1992 Act and therefore is caught by s. 6 (5) (a) of the 1999 Act.
[40] *Carver on Bills of Lading*, 1st. Edition, London: Sweet & Maxwell 2001, at para. 8- 074.
[41] This possibility is recognised in Law Commission's Report on which the Contracts (Rights of Third Parties) Act 1999 was based.

would be subject to CMR, as was held by the Court of Appeal in *Quantum Corporation Inc and Others .v. Plane Trucking Ltd. and Another*,[42] a case involving mixed air and road transport.

5. 4. BAILMENT UNDER US LAW

As mentioned before, American courts, under US Law, answered the question of the carrier's identity by the principle of agency and also, in some cases, by conferring the status of carrier on both the charterer and the shipowner who participate in the carriage contract. Accordingly, the 'practical approach' provides that all parties involved in the carriage of goods are carriers for COGSA 1936. This approach, arguably, would reduce, if not demolish, the need of cargo owners to sue in bailment law under the general maritime law. This is because COGSA provides an exclusive remedy to the cargo owner, although COGSA is silent on its pre-emptive scope. However, COGSA 1936 provides that it does not supersede any laws "insofar as they relate to duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship".[43] Nonetheless, the application of the provisions of COGSA supersedes other laws during the time after cargo is loaded and before it is removed from the ship.[44] In contrast, under the 'agency approach' the charterer might be the carrier under the bill of lading and so the shipowner would not be considered as the COGSA carrier. Therefore, this approach would allow the cargo owners to sue the shipowners in bailment when a charterers' bill of lading is issued. In *Tuscaloosa Steel Corp. v. M/V "NAIMO"*[45] it

---

[42] [2002] 2 Lloyd's Rep. 25, ([2002 EWCA Civ 350).
[43] See 46 U.S.C.App. s. 1311 (1999).
[44] See *Sail America Foundation .v. M/V T.S. Prosperity*, 778 F. Supp. 1282 at 1285 (S.D.N.Y. 1991); *St. Paul & Marine Ins. Co. v. Marine Transp. service Sea Barge Group, Inc.*, 272 F. Supp. 1438 at 1442 (S. D. Fla. 1989); *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F. 3d 1349 at 1354 (5th Cir. 1995) and *Polo Ralph Lauren, L.P. v. Tropical shipping & Constr. Co.*, 215 F. 3d 1217 at 1220 (11th Cir. 2000) and Kvandal, J., "Extending the COGSA Umbrella: The Eleventh Circuit Sets Limits for the Standing of Cargo Owners not Named in Bills of Lading in Polo Ralph Lauren, L.P. v. Tropical Shipping & Construction Co." 25 Mar. Law. 537.
[45] 1993 AMC 622, (S.D.N.Y. 1992).

was held that "Fairness dictates the law of bailment be an available remedy to a shipper where the owner is not bound to the contract of carriage".[46] However, the decisions of the Southern District of New York in both *Sail America Foundation .v. M/V T.S. Prosperity*[47], *St. Paul & Marine Ins. Co. v. Marine Transp. service Sea Barge Group, Inc.*,[48] and *Tuscaloosa Steel Corp. v. M/V "NAIMO"* [49] provide that on the one hand, COGSA is the exclusive remedy for the cargo loss or damage against carriers when it is applicable while, on the other hand, the general maritime law applies when COGSA is inapplicable to a particular party or under particular circumstances.

The carrier might, however, be liable to the shipper or the cargo owner as a bailee for the loss of or the damage to the goods during the period before loading or after discharge. In *Leather's Best, Inc., v. S.S. Mormaclynx*,[50] the carriage contract continued in effect after the cargo had been discharged, but it failed to specify the precise responsibilities of the carrier in respect of the container during that period before delivery. The court held that "upon landing the cargo, the carrier assumed the status of bailee and continued to occupy that status, remaining liable for the cargo's safe delivery, regardless into whose hands it placed the cargo, unless it terminated its liability by placing the cargo in a public dock or warehouse in accordance with the bill of lading".[51] It held, then, that "thus, although the container was in possession of Tidewater [terminal operator] at the time the loss occurred, we have no doubt that, for purposes of determining Mooremac's liability [shipowner], it stands in the shoes of the agent it utilised to perform its obligations, the

---

[46] *Ibid.* at 626- 627, the court also permitted a cargo owner to bring a tort claim against a negligent shipowner who was not a 'carrier' within the meaning of COGSA; *D B- Trade International, Inc. v. Astramar Cia Argentina Navegacion S.A.C.*, 1988 AMC 766 at 767, (N.D.Ill. 1987) (same), and *EAC Timberlane v. Pisces, Ltd.*, 745 F. 2d. 715 at 721, 1985 AMC 1594 (1st Cir. 1984) (general maritime law also applies to parties who are not regulated by COGSA).

[47] 778 F. Supp. 1282 (S.D.N.Y. 1991).

[48] 272 F. Supp. 1438 at 1442 (S. D. Fla. 1989).

[49] See *supra* fn. 45.

[50] 451 F. 2d 800 at 811, 1971 AMC 2383 (2d Cir. 1971).

[51] *Ibid.* at 812.

negligence of the agent being imputed to the principal".[52] The court applied federal bailment law to the shipowner's liability and concluded that the shipowner was liable since it could not rebut the bailor's *prima facie* case.[53]

The courts have established that cargo owners or shippers would only be able to sue the carriers, under federal bailment law, as bailees, when COGSA is inapplicable to a particular party or under particular circumstances. Although no formal contract is required to create a bailment, lawful possession and a duty to account for thing as the property of another, is necessary. However, physical control coupled with an intent to exercise control over the goods constitute possession.[54] The Court held in *Hartford Fire Insurance co. v. Empresa Ecuatoriana De Aviacion d/b/a Ecuatoriana Airline, and AMR Services, Inc.*,[55] that "In the absence of a mutual contract of bailment, an implied bailment arises when a party comes into lawful possession of the personal property of another". The court applying the common law of bailment, held, "the subject shipment entered the possession of AMR Services after the cargo was placed outside the terminal door by American Airlines. Nieves' handling of a portion of the freight is sufficient proof that AMR had possession of the cargo".[56] The Court of Appeals for the Ninth Circuit held in *Graham Whitcombe v. Stevedoring Services of America*,[57] held that the bailment relationship between the cargo owner, Whitcombe, and terminal operator, SSA, came into being when Whitcombe caused the cars to be delivered to SSA.

---

[52] *ibid.*
[53] *Ibid.* at 813.
[54] See *Otto Wolff Handelsgesellschaft, mbh v. Sheridan Transportation Company*, 800 F. Supp 1359 at 1366, 1993 AMC 406.
[55] 945 F. Supp. 51 at 56 (S.D.N.Y 1996). This case dealt with the bailment's issue in regard to handling services on land.
[56] *Ibid.* at 57.
[57] 2 F. 3d 312, 1993 AMC 2097 (9th Cir. August 16, 1993). This case dealt with the terminal operator that provided stevedoring services as well as storage services.

The Court of Appeals for the Eleventh Circuit in *Polo Ralph Lauren, L.P. v. Tropical shipping & Constr. Co.*,[58] dismissed Polo's bailment claim against the shipowner on its finding that Polo, as a cargo owner who was neither the shipper nor specifically named in the bills of lading, was able to sue the shipowner by analogy of its vulnerability to that of a stevedore who is granted COGSA protections through the use of a Himalaya clause.[59] The court held in *Transatlantic Marine Claims Agency, Inc., v. M/V "OOCL Inspiration", Orient Overseas Container Line (UK) Ltd., and Sea- Land Service, Inc.*,[60] citing *Tuscaloosa Steel Corp. v. M/V "NAIMO"*, that the shipowners, under charterers' bill of lading, were liable as bailees for the damage to the cargo while in its possession. The terms of the bailment between the cargo owner and the shipowners were the terms of the charterers' bill of lading.[61]

In *Thyssen Steel Co. v. M/V Kavo Yerakas*,[62] Thyssen Steel Company (Thyssen) and Associated Metals and Minerals Corporation (AMMC) entered in a carriage contract with Eurolines, the time charterer, to transport steel pipe from Europe to United States aboard M/V Kavo Yerakas. The cargo was loaded pursuant to bills of lading issued and signed by Euroline's agent "for the master". On arrival, some of the cargo was damaged and thus, both (Thyssen) and (AMMC) sued Eurolines and Dodekaton, the shipowner. The Court of Appeal for the Fifth Circuit in *Thyssen Steel Co. v. M/V Kavo Yerakas*,[63] considered the bailment issue as an alternative head of claim in the event the cargo owners

---

[58] 215 F. 3d 1217 at 1220, 2000 AMC 2129 (11th Cir. 2000)

[59] The bills of lading contained a clause binding the shipper, consignee, or the owner of the goods to the stipulations of the ocean bill of lading. *Ibid.* at 1221- 1224. The court did not explore the doctrine of sub-bailment on terms as a ground for allowing Polo to sue the shipowner.

[60] 961 F. Supp. 55 at 60 (S.D.N.Y. 1997).

[61] However, clause (2) of the charterers' bill of lading identified both the charterers and the shipowners as the carriers and clause (4) stated that "The carrier identified in Clause 1 [the charterers 'OOCL' (UK)] hereof agrees to perform the ocean transportation between the Port of Loading and Port of Discharge on the Vessel named in the Bill of Lading or any substitute vessel". The court, also, did not explore the doctrine of sub-bailment on terms as a ground for applying the shipowner's tariff that was higher than COGSA. Instead, the court held that "To the extent the Bill of Lading is ambiguous with regard to whether COGSA or Sea- Land's tariff [shipowners] should apply, such ambiguity must be interpreted against the drafting party, in this case Defendants [charterers and shipowners]". *Ibid.* at 60.

[62] 50 F. 3d 1349 at 1351 (5th Cir. 1995).

[63] *Ibid.* at 1354.

failed to prove that the master had granted Eurolines permission to sign the bill of lading on his behalf. Therefore, the court in *Thyssen Steel Co. v. M/V Kavo Yerakas*,[64] held that "Bailment is the delivery of goods or personal property to the bailee in trust, under an express or implied contract, which requires the bailee to perform the trust either to redeliver the goods or to otherwise dispose of the goods in conformity with the purpose of the trust". Accordingly, the court held that (Thyssen) and (AMMC) have not established a *prima facie* bailment against the shipowner, Dodekaton, on two grounds. First, the absence of an express or implied bailment contract between them. Second, Thyssen's failure to establish that the cargo was within the exclusive possession of Dodekaton during transit.[65] Therefore, it held that on the alternative ground, Dodekaton was not liable as a bailee for the cargo damage under general maritime law.

In *Office of Supply Government of the Republic of Korea v. M.V. Naftoporos, Sanko Steamship Co., Ltd.*,[66] Anne, the shipowner, time chartered the vessel to Sanko. Then, Sanko voyage chartered the vessel to American Coal, the seller, to deliver the cargo of coal to Samsung, the buyer. The master of the vessel authorised American Coal's agent to issue a bill of lading covering the coal. A bill of lading signed by American Coal's agent as an agent "for the master" was issued which named Samsung as the shipper and Office of Supply, the plaintiff, as consignee of the cargo. Sanko as a time charterer was neither a party to the bill of lading nor a carrier within COGSA. The court held that "assuming that a bailment relationship can exist between a cargo owner and a time charterer which is not a

---

[64] *Ibid.* at 1354- 1355.
[65] See *T.N.T Marine service, Inc. v. Weaver Shipyard & Dry Docks, Inc.*, 702 F. 2d 585 at 588 (5th Cir. 1983) where it was held that under the general admiralty law, bailment does not arise unless delivery to the bailee is complete and he has exclusive possession of the bailed property, even as against the owner. A bailee's duties are limited when the owner or his agent or employee remains with vessel or has access to it. See, also, *Continental Insurance Co. v. Washeon Corp.*, 524 F. Supp. 34 at 37 (E.D.Mo. 1981).
[66] 1985 U.S. Dist. LEXIS 15671 at [2] (S.D.N.Y 1985).

carrier, the plaintiff failed to prove that Sanko ever had the cargo within its custody and control".[67]

It has long been recognised under the law of admiralty that for many, if not most, purposes the demise charter is to be treated as the owner, generally called the owner *pro hac vice*. Accordingly, the cargo owner's remedies would be solely against the demise charterer or the vessel in *rem*. Therefore, the court in *Otto Wolff Handelsgesellschaft, mbh v. Sheridan Transportation Company*,[68] held that the shipowner under a demise charter would not be liable to the cargo owner as a bailee, because the shipowner has no control over the carriage contract between the demise charterer and the cargo owner and so the court agreed with the shipowner that bailment is contractual in nature, and that "the bill of lading is the contract of carriage" where a charterer issues one to a consignee and therefore, there would no non- contractual liability on the shipowners.

The burden of proof under federal bailment law differs from that under COGSA. Under federal bailment law, a bailor makes out a *prima facie* case of bailment by establishing that the goods were delivered in good condition and returned in damaged condition.[69] The court held in *Caemint Food, Inc. v. Brasileiro*,[70] that the *prima facie* case, is, in reality, a species of *res ipsa loquitur*, and is comprised of two elements. First, the delivery of the goods to the carrier in good order and condition, and secondly, the discharge from the vessel in damaged condition.[71] The Court in *Hartford Fire Insurance co. v. Empresa Ecuatoriana De Aviacion d/b/a Ecuatoriana Airline, and AMR Services, Inc.*,[72] citing New York Law, also, held that "When there is admission or other proof that

---

[67] *Ibid.* at [14- 15].
[68] 800 F. Supp 1359 at 1366, 1993 AMC 406.
[69] See *Leather's Best, Inc., v. S.S. Mormaclynx*, See *supra* fn. 50 at 812.
[70] 647 F. 2d 347 at 352 (2d Cir. 1981).
[71] The court, also, in *Acwoo International steel Corp. v. Toko Kaiun Kaish, Ltd., and Nicholson Terminal & Dock Co.*, 840 F. 2d 1284, 1988 AMC 2922 (6th Cir. 1988) endorsed the *prima facie* case.
[72] See *supra* fn. 55 at 57.

the property entered into the possession of the bailee and then was not returned, it is the duty of the bailee to explain the loss".

Moreover, the court in *Leather's Best, Inc., v. S.S. Mormaclynx*,[73] held that the burden of production, but not the burden of persuasion, then shifts to the bailee. The meaning of this rule was developed in *Commercial Molasses Corp. v. New York Tank Barge Corp.*,[74] where it held that "the burden of proof in litigation, wherever the law has placed it, does not shift the evidence, and in determining whether petitioner has sustained the burden in question often is, as in this case, what inference of fact he may summon to his aid. In answering it in this, as in others where breach of duty is the issue, the law takes into account the relative opportunity of the parties to know the fact in issue and to account for the loss, which it is alleged, is due to the breach. Since the bailee in general is in a better position than the bailor to know the cause of the loss and to show that it was one not involving the bailee's liability, the law lays on him the duty to come forward with the information available to him. If the bailee fails, it leaves the trier of fact free to draw an inference unfavourable to him upon the bailor's establishing the unexplained failure to deliver the goods safely. Whether we label this permissible inference with the equivocal term 'presumption' or consider merely that it is a rational inference from the fact proven, it does no more than require the bailee, if he would avoid the inference, to come forward with evidence sufficient to persuade that the non- existence of the fact, which would otherwise be inferred, is as probable as its existence. It does not cause the burden of proof to shift, and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference, which the trier of fact is unable to resolve, the bailor does not sustain the burden of persuasion which upon the whole evidence remains upon him, where it rested at the start".

---

[73] See *supra* fn. 50 at 812.
[74] 314 U.S. 104 at 111, 62 S. Ct. 156 (1941).

To rebut the bailor's *prima facie* case, the court in *Leather's Best, Inc., v. S.S. Mormaclynx*,[75] held that the bailee must show either how the disaster in fact occurred and that this was in no way attributable to his negligence, or the he exercised the requisite care in all that he did with respect to the bailed article so that, regardless of how the accident in fact transpired, it would not have been caused by any negligence on his part. The court held in *Transatlantic Marine Claims Agency, Inc., v. M/V "OOCL Inspiration", Orient Overseas Container Line (UK) Ltd., and Sea- Land Service, Inc.*,[76] that "Defendants [chaterers and shipowners] have not provided an alternate explanation of how the cargo was sea water wetted, or proof that Sea- Land [the shipowners] exercised the requisite care with respect to the bailed cargo. Consequently, Defendant Sea- Land is also liable as bailee".

Under American law, the burden of proof under bailment law differs from that under negligence. The court held in *Caemint Food, Inc. v. Brasileiro*,[77] that in order to establish a claim in negligence against the carrier, the plaintiff must, not only, prove the existence of a negligent act on the part of the defendant, but must also prove that the defendant's negligent act was a proximate cause of its injury. The court held in *EAC Timberlane v. Pisces, Ltd.*,[78] that "the defendants would be liable in tort for the loss of cargo only upon proof that their negligence caused the loss. Accordingly, the district court's finding that the defendants affirmatively proved freedom from any fault in

---

[75] See *supra* fn. 50 at 813. See, also, *Nichimen Co. v. M/V Farland*, 462 F. 2d 319 at 325- 326 7 & n. 1 (2d Cir. 1972) (had COGSA not applied to plaintiff's claim, the defendant carrier would have had to meet a different standard defending against a federal bailment claim).

[76] See *supra* fn. 60 at 61.

[77] 647 F. 2d 347 at 352 (2d Cir. 1981).

[78] 745 F. 2d. 715 at 722, 1985 AMC 1594 (1st Cir. 1984). The question before the court was the applicability of the Limitation of Liability Act 1982, of COGSA 1936 and of principles of general maritime law in determining the liability of the shipowners, charterers and the vessel's operators for the cargo lost when the vessel carrying the cargo exploded and sank on the high seas. The court concluded that, it was not necessary to decide which party was the carrier under COGSA, since all defendants were exonerated from liability whether their responsibility for the loss is properly ascertained under COGSA or under general maritime law.

connection with the loss and that the plaintiffs failed to rebut this proof is sufficient to exonerate each of the defendants from liability under the general maritime law".

Terminal operators are independent contractors to the carrier and the provisions of COGSA do not govern their liabilities. Nonetheless, terminal operators, which provide stevedoring services as well as storage services, have the status of bailees under state law. As bailees, terminal operators will be liable for negligence or lack of due care that results in loss or damage to cargo. Suits against terminal operators for the loss of or the damage to the goods while in storage are governed by state bailment law rather than by federal bailment law. The Court of Appeals for the Ninth Circuit held in *Graham Whitcombe v. Stevedoring Services of America*,[79] that the liability of SSA, a terminal operator, as a bailee was governed by the State of California bailment law on the ground that the location of the injury was on land and the activity led to the injury has no sufficient nexus to traditional maritime activities of loading or discharging the cargo. Accordingly, the burden of proof under federal bailment law differs from that under state bailment law. The court in *Leather's Best, Inc., v. S.S. Mormaclynx*,[80] citing New York law, held that "In cases of loss due to theft, New York requires the bailee to establish only the fact of theft in order to meet the bailor's *prima* facie case. The bailee is not required to go on to show that the theft was not the result of its negligence; rather it is for the bailor to demonstrate negligence on the part of the bailee in the context of loss by theft". The Court in *Hartford Fire Insurance co. v. Empresa Ecuatoriana De Aviacion d/b/a Ecuatoriana Airline, and AMR Services, Inc.*,[81] citing New York law, held that "Even where the bailee claims that the property was stolen, if the bailor has demonstrated that the theft was due to the bailee's negligence, the bailee has the burden of showing that the theft was not occasioned by its negligence". The similarities between state bailment law and federal bailment law, in the above cases, ended

---

[79] See *supra* fn. 57.
[80] See *supra* fn. 50 at 814.
[81] See *supra* fn. 55 at 60.

in respect to the burden of proof in the cases of loss due to theft. However, the courts are divided in respect of the law applicable to the period outside the "tackle to tackle" period of COGSA. On the one hand, some courts have applied the state law rather than federal law, as in the above cases. On the other hand, other courts have applied the federal law rather than the state law as in *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*[82]

5. 5. LIABILITY IN NEGLIGENCE

In international sales, when the goods are lost or damaged in transit as a result of fault of the carrier or his servants, the buyer is the only person who is interested in pursuing a claim against the carrier. The buyer could not sue the carrier by virtue of s. 1 of the 1855 Act, either because the property had not passed "upon or by reason of endorsement or consignment" but at a later time or he is the holder of a delivery order, or he is claiming as a consignee named in a sea waybill. Also, the buyer will not be able to establish an implied contract on the terms of the bill of lading between himself and the carrier in the absence of the consideration or intention to create contractual relations as if he took delivery of the good as agent of another person such as the seller. Thus, the question is whether the buyer can sue the carrier in tort and the most obvious claim would be in negligence for the damage done to the goods in transit.

However, there was a conflict of authorities in respect of who has the right to sue where the claim in negligence is concerned. The first authorities were founded in *The Wear Breeze*[83] and *The Elafi*[84], which supported the view that the buyer must be the owner of the goods or have an immediate possessory right to them when they were damaged in order to be such claim available to him. The second authorities were founded in *The Irene's*

---

[82] 5 F. 3d 734, 1993 AMC 2842 (4th Cir. 1993).
[83] [1969] 1 Q.B. 219. Where the claim in tort succeeded because the property had passed at the relevant time.
[84] [1981] 2 Lloyd's Rep. 679.

Success[85] and *The Nea Tyhi*[86], which supported the view that the risk must have passed to the buyer when the damage was done, even if he was not yet the owner of the goods, in order such claim to be available to him. The House of Lords were to resolve the conflict in *The Aliakmon*.[87] A consignment of steel coils was shipped from Korea to Immingham under a c & f contract. As a result of the buyer's bank refusal to back the bill of exchange by which the payment for the goods was to be made, the original contract was subsequently varied. Thus, the risk passed to the buyer on shipment but the property remained with the sellers by reason of their reservation of the right of disposal of the goods. On discharge of the goods they proved to be in damaged condition. The question before the House of Lords was whether the shipowner owed a duty of care in tort to the buyer in respect of the carriage of such goods and if so, whether and to what extent such duty is qualified by the terms of the bill of lading under which the goods were carried.

However, the House of Lords regarded *The Wear Breeze* as part of a long line of authority and concluded that

> [the] principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property.[88]

The buyers in *The Aliakmon* were not the owners of the goods at the time of loss or damage but they had only a contractual right against the sellers to have the possession and the property of the goods at later time. Moreover, the transfer of the bill of lading which constituted a constructive delivery of the goods to him was not sufficient to found a

---

[85] [1982] Q.B. 481.
[86] [1982] 1 Lloyd's Rep. 606.
[87] [1986] 2 W.L.R. 902.
[88] *Ibid.* at 908. According to *The Wear Breeze*, [1969] 1 Q.B. 219 at 228, only an immediate right to possession which is sufficient to amount to 'possessory title' for this purpose.

possessory title to enable the buyers to sue in negligence.[89] In order to enable the buyer to sue in negligence he must have an immediate right to the actual possession of the goods. But the buyers, in *The Aliakmon*, had no immediate right to the possession of the goods against either the carrier since the freight was prepaid, which is not relevant to this case, or against the sellers who still had the right of disposal of the goods by the terms of the original contract of sale.[90] It is arguable that the person who is going to bear the risk should be the person who have the title to sue in tort. Also, why should the concept of risk be treated as "an alien" to the carriage of goods by sea while the concept of the property which is also "an alien" is regarded as relevant to the carriage by sea?[91]

The House of Lords rejected the argument of the buyer which was based upon the equitable ownership as a result of the goods having been appropriated to the contract, unless either the equitable owner has a possessory title to the goods or the legal owner joins him as a party to the action.[92] Moreover, equitable ownership is doubtful in sales contracts since the Sale of Goods Act 1893 "is a complete code of law in respect of contracts of sale in sale of goods" and also ss. 16 to 19 deal with the passing of property without "distinction between the legal and the equitable property in goods" and are "intended to comprise both the legal and the equitable title".[93]

The buyers tried, as a result of the buyers position under a c.i.f. or c & f. contract to whom the risk but not yet the property in the goods has passed, to "create a strictly limited exception to the general rule based upon the circumstance that the consideration of policy on which that general rule was founded did not apply to that particular case".[94] The House

---

[89] This is because the buyers took delivery of the goods as agents for the seller.
[90] See Treitel, G.H., "Bills of lading and third parties" [1986] LMCLQ. 294 at 299; Sir Lloyd, A., "The bill of lading : do we really need it" [1989] LMCLQ. 47 at 54.
[91] Certainly the concept was far from 'alien' to the Bills of Lading Act 1855.
[92] See *supra* fn. 87 at 910. It would mean that the buyer could have succeeded by merely joining the sellers as co- defendants.
[93] *Ibid.*
[94] *Ibid.* at 914.

of Lords rejected the argument on the ground of the certainty which "would be seriously undermined". However, the buyers called for qualification of the duty of care owed by the shipowner according to the terms of the bill of lading by relying on *Junior Books Ltd. v. Veitchi Co. Ltd.*[95] But, this argument was also rejected by the House of Lords as a result of the absence of the legal basis for qualifying a duty of care "owed by A to B by reference to a contract to which A is, but B is not, a party".[96] The buyers' argument that the duty of care did exist but it was subject to the terms of the bill of lading was also rejected, since the duty of care owed by the shipowners to the buyers in tort would be the same as the contractual duty of care owed to the shipper.[97] Finally, the buyer relied upon the bailment on terms to qualify the duty of care owed by the shipowners by the terms of the bill of lading. But, this argument failed because the bill of lading had never been negotiated to the buyers and no attornment by the shipowners had ever taken place.

The House of Lords suggested that the buyers could have resolved their problem by including a further term in the variation to make the sellers obliged to either to exercise this right for the buyers account, or to assign such right to them to exercise for themselves. By taking such steps, the buyers would not have been prejudiced by their lack of a tort claim in negligence against the carrier. According to the House of Lords' suggestion, the buyer will have a less extensive right than the rights under s. 1 of the 1855 Act or under an implied contract. The buyer will lose the benefit of estoppels arising from false statements in the bill of lading, because such estoppels are not available to the seller who is the original shipper. However, in *The Aliakmon*, the buyers' loss was not suffered in this way, since the buyers knew that the goods were damaged when the sellers' claim for the price was settled and they never paid against the bill of lading. Suing the carrier for

---

[95] [1983] 1 A.C. 520.
[96] See *supra* fn. 87 at 915.
[97] *Ibid.* See also Sir John Donaldson M.R., in *The Mineral Transporter,* [1985] Q.B. 350 at 368.

misrepresentation would achieve the same result as using the estoppel doctrine.[98] The assignment, as a way of filling the gaps of the 1855 Act, should be in writing with notice of the assignment given to the obligor, depends upon the willingness of the seller to co-operate and the ability of the seller to have both a cause of action and the right to claim substantial damages such as in *The Albazero*.[99] The buyer of part of a large bulk cannot use this way because partial assignment is not covered by section 136 of the Law of Property Act 1925. Moreover, every one in the trading chain should assign his rights in turn and so any break in the chain of assignment would be fatal to the ultimate buyer's claim.[100]

Regarding recovery of substantial damages, the seller, according to *The Sanix Ace*[101] which had been distinguished from *The Albazero*,[102] should have either the property, or a right to the possession of the goods, even if the goods were at the risk of the buyer at the time of the breach. Moreover, the assignment will not introduce a satisfactory solution in the case of charterparty, because it may contain more extensive limitations on the carrier's liability than those which are permitted by the Hague Rules or Hague- Visby Rules, or action in tort. Therefore, where the shipper is the charterer and the rights which are assigned are those in the charterparty which may be inferior to those in the bill of lading. Lord Brandon adds

> These considerations show, in my opinion, not that there is some lacuna in English law relating to these matters, but only that the buyers, when they agreed to the variation of the original contract of sale, did not take the steps to protect themselves which, if properly advised, they should have done.[103]

---

[98] For more details see Treitel, G. H., *supra* fn. 90 at 304.
[99] [1976]2 Lloyd's Rep 467.
[100] For more details see Wiseman, R. M., "*The Delfini* and its Consequences for CIF Transactions" 8 OGLTR [1988/ 89] 220 at 222- 223; Bassindale, J., "Ownership, Risk and Title to Sue in Oil Trading Contracts" 7 OGLTR [1988/ 89] 171 at 177.
[101] [1987] 1 Lloyd's Rep. 465.
[102] See *supra* fn. 99.
[103] See *supra* fn. 87 at 917.

The buyers in *The Aliakmon* agreed with the sellers, as a result of the meeting between them and the sellers, to take delivery of the goods as agents but not as principals and then the bill of lading was indorsed to the buyers as agents for collection the goods from the carrier. Therefore, the buyers could have sued the carrier, by virtue of s. 2 (1) of the 1992 Act, on the terms of the bill of lading. But, would the agent be considered as a lawful holder of the bill for the purpose of the 1992 Act and so be able to sue for the benefit of his principal? There is a suggestion that the concept of possession can be flexible so as to allow the agent to have actual possession and the principal to have constructive possession. Therefore, if the agent can not be considered as a lawful holder of the bill, the seller might be able to sue the carrier for his loss and for the benefit of any person who had suffered loss as in *The Aliakmon* according to *Dunlop .v. Lambert*[104] as an exception to the common law rules.

The problem in *The Gosforth*, which prompted the enactment of COGSA 1992, is solved now by the enactment of the Sale of Goods (Amendment) Act 1995.[105] The sub-buyers, who in *The Gosforth* received only merchants's delivery orders, claimed priority over the cargo against the unpaid seller who exercised his right to arrest the ship under the Dutch law. The Dutch Commercial Court held that the sub- buyers had no priority over the goods since no property had passed to them under both English and Dutch law. However, buyers with a merchant's delivery order, as the sub- buyers in *The Gosforth*, will not be able to sue the carrier under the 1992 Act, since this document is not included by its provisions. Also, the buyer will not be able sue the carrier under the implied contract theory since, delivery of the goods will be without presentation of this document as in the case of sea waybill. However, the buyer will obtain property in common with the other

---

[104] [1838- 39] 7 E.R. 824.

[105] For more details about this Act see Thomas, W.H., "Sale of Goods (Amendment) Act 1995" 3 [1995] Current Law Statutes 28- 1; Uiph, J., "The Sale of Goods (Amendment) Act 1995: Co- ownership and the Regue Seller" [1996] LMCLQ 93 and B. J. D., "Ownership of Bulk Cargoes- *The Gosforth*" [1986] Lloyd's Maritime and Commerce Law 4.

buyers of bulk, by virtue of s. 20 A of the Sale of Goods (amendment) Act 1995, if he has paid the price and the bulk has been identified according to that section and therefore, the buyer would be able to sue the carrier in tort. But, the bulk cargo owner still has a problem if he has not paid the price, at the time where the loss or damage to the goods occurred, since no property in common would have passed according to s. 20 (A). This problem will be magnified by the ambiguity of s. 2 (4) of the 1992 Act which depends on how the courts will interpret the words "rights or interest".

A further problem with a claim in negligence exists where there is progressive deterioration of goods on a voyage. Rix L.J., in the Court of Appeal, in *The Starsin*,[106] concluded that a successful claim in tort of negligence consists of three elements; the existence of a duty of care, a breach of that duty and a loss or damage caused by that breach, adding that "it must fellow that only the person with title to the goods when that loss or damage occurs can sue in respect of it". In respect of the existence of a duty of care, Rix L.J., refused to give decision on the question of whether a shipowner owes a duty of care towards further holders of a bill of lading[107] on the ground that the *dicta* of both Roskill J., in *The Wear Breeze*[108] and Lord Brandon in *The Aliakmon*[109] were relating to "claimants there [who] never obtained title while the goods were on board the vessel or before all relevant loss had already been suffered" but not to "a claimant who had actually suffered damages to his goods during the voyage, and after they had become his goods on the voyage".[110] Therefore, Rix L.J., held that the *dicta* in both cases reflects the English law that the shipowner's duty of care only exists towards the owner of the goods at the

---

[106] [2001] 1 Lloyd's Rep. 437 at para. 78, ([2001] EWCA Civ 56).
[107] Colman J., at first instance, in *The Starsin*, [2000] 1 Lloyd's Rep. 85 at 102, took the view that "... in principle, the duty of care owed by the shipowners in respect of the cargo in their possession is engendered by the proximity of the shipowners to the goods in their possession and to those who presently have title to such cargo or who may acquire title in the course of the voyage and while the goods remain in their possession". Colman J., also, held that the shipowner's duty was unaffected by the fact that under the time charter stowage was the responsibility of the time charterer.
[108] See *supra* fn. 83.
[109] See *supra* fn. 87.
[110] See *supra* fn. 106 at para. 94.

time of the breach of duty occurs. On the facts of *The Starsin*, the breach of duty, defective stowage, caused a progressive condensation damage which continued throughout the voyage and the question before the Court of Appeal was whether the progressive damage done in this case does create a new cause of action in respect of the later stages of the same progressive damage? Rix L.J., held that "the progressive damage done in this case does not create a new cause of action in respect of the later stages of the same progressive damage, even in the hands of a new cargo- owner and even upon the assumption that the new cargo-owner was always within the scope of the shipowner's duty of care".[111] Therefore, the claimants' claim in tort was denied because the cause of action in negligence was completed before the acquired title to their particular cargo of timber, with one exception to the holder of the set of bills who acquired title shortly after the completion of loading and before the commencement of the ocean voyage. This analysis of the position in tort was subsequently approved by the House of Lords.

Article IV bis (1) Hague- Visby Rules

Would the conclusion of *The Aliakmon* have been different had the bill of lading been subject to the Hague- Visby Rules rather than the Hague Rules? Article IV bis (1) provides that

> The defences and limits provided for in these Rules shall apply in and action against the carrier in respect of loss or damage to the goods covered by a contract of carriage whether the action be founded in contract or in tort.

This could mean either that a party to the contract of carriage cannot improve his position by suing the carrier in tort with disregarding the contract of carriage[112] or that the Hague-Visby Rules are applicable to a tort claim by someone who is not a party to the carriage

---

[111] *Ibid.* at para. 105.
[112] See Boyd, S. C., (*et al*), *Scrutton on Charterparties and Bills of Lading*, 20th Edition, London: Sweet & Maxwell 1996 at p. 454.

contract.[113]According to the first view, the buyers in *The Aliakmon* were not a party to the carriage contract[114] and therefore, the carrier would be deprived of the benefit of the Rules had the buyers established their title to sue in tort. Bingham, L.J., in *The Captain Gregos*,[115] found that the principal object of art. IV (1) is "to ensure that a cargo- owner is no better off suing in tort than he would be if he sued in contract".[116] Bingham, L.J., rejected the carrier's argument that the Hague- Visby Rules had statutory effect simply because the bills of lading were issued subject to the Rules, regardless of whether the person making the claim was party to the contract or not.

Bingham, L.J., justified his conclusion upon three grounds. First, he thought that the bill of lading was the "bedrock" of the Rules, stating "It is not clear to me why the [C]ode should treat the existence of a bill of lading as a matter of such central and overriding importance if the [C]ode is to apply with equal force as between those who are not parties to the contract which the contains or evidences".[117] Secondly, the language of the Carriage of Good by Sea Act 1971 suggests that the Rules are intended to govern the relationships between the parties of the bill of lading contract. Thirdly, "whatever the law in other jurisdictions, the general principle that only a party to a contract may sue on it well- established here" and "If the draftsmen had intended the respective rules to infringe that principle or appreciated that that was their effect, I think they would have sought to make that clear in the Acts"[118]

---

[113] Diamond, A., "The Hague- Visby Rules" [1978] LMCLQ. 225 at 248- 249.
[114] The buyer sued the carrier in respect of the damaged goods. However, the buyer can not sue the carrier by virtue of s. 1 of the 1855 Act because the property, as a result of the sellers' reservation of the right of disposal of the goods, in the goods did not pass "upon or by reason" of the endorsement of the bill of lading but upon payment of the price after the goods had been discharged and warehoused at Immingham. [1986] 2 W.L.R. 902 at 909.
[115] [1990] 1 Lloyd's Rep. 310.
[116] *Ibid.* at 315.
[117] *Ibid.* at 318.
[118] *Ibid.* at 318. However, it is arguable that, the carrier would be deprived of the benefits of the Hague-Visby Rules had the buyers established their title to sue in tort and had no contractual rights with the carrier.

It appears that art. IV bis (1) of the Hague- Visby Rules did not provide an exclusive solution to all the problems concerning non- contractual claims and so, the interpretation of art. IV bis (1), by the courts, would play a vital role for solving those problems. It is clear that the cargo owner would not be able to sue the carrier if there is a contractual relationship between him and the carrier and so art. IV bis (1) did not add anything to English law, since the cargo owner would be unable to sue the carrier in tort where he has a contractual relationship with the carrier. But, the important question is whether the defences and the limits of liability would be applies by suing the carrier directly in tort, such as the shipowner in the case of charterer's bill of lading. On the one hand, Diamond has argued that art. IV *bis* (1) of the Rules applied where the carrier, as defendant, is a carrier as defined in art. I (a) of the Rules, namely an owner or charterer who enters into a carriage contract with the shipper and thus, the freight forwarder who enters a carriage contract, as a shipper, with the carrier would included by art IV bis (1) of the Rules.[119] On the other hand, Berlingieri has argued that art. IV bis (1) would be applied to any action in tort against the carrier who is contracting carrier in respect of loss or damage to the goods covered by a carriage contract to which the Rules apply whether the cargo owner, as a plaintiff, is a party to the carriage contract or not.[120] However, the above arguments were rejected by Bingham L.J., in *The Captain Gregos*,[121] where he held that art. IV bis (1) only applies where there is privity of contract between the plaintiff, the cargo owner, and the defendant, the carrier.[122]

---

[119] See Diamond, A., *supra* fn. 113 at pp. 248- 249.

[120] See Berlingieri, F., "The Hague- Visby Rules and actions in tort" [1991] L.Q.R. 18 at 21. It is arguable that the effect of art. IV bis (1) of the Rules might, as Francisco concluded, be different if the original draft of this article which was prepared by the International Sub- Committee was not amended at the Stockholm Conference. The original draft provides that, "Any action for damages against the carrier, whether founded in contract or in tort, can only be brought subject to the conditions and limits provided for in this Convention".

[121] See *supra* fn. 115.

[122] This construction has been rejected by both Diamond, A., see *supra* fn. 113 at pp. 248- 249 and Berlingieri, F., see *supra* fn. 120. But, Bingham's L.J., conclusion is supported by Boyd, S. C., *supra* fn. 112 at p. 454; Cooke, J., (*et al*), *Voyage Charters*, London: Lloyd's of London Press Ltd. 1993, at p. 796; Davenport, B. J., "Limits on the Hague Rules" [1989] L.Q.R. 521.

It is likely that the conclusion of Bingham L.J., is right on the ground that the draftsmen of the Rules provided no answer to the question of who can sue and who can be sued and these question would be left to be answered by the national law. Privity of contract is one of the most important general principles of the English law providing that only a party to a contract may sue on it. Therefore, if Parliament had intended to infringe that principle, it would have done that by simple and clear indication in the 1971 Act. Also, if the draftsmen of the Rules had intended to entitle the non- contracting carrier to the defences and the limits of liability, they would expressly have done that in the same way as under the Hamburg Rules. It is also arguable that the above conclusion can be supported by reference to art. 10 (2) of the Hamburg Rules which provides the actual carrier with the same protection as the contractual carrier, since the actual carrier's responsibility is governed by the provisions of the Rules, by virtue of art. 1 (2) which defines the actual carrier as "any person to whom the performance of the carriage of goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted". In contrast, art. I (a) of the Hague- Visby Rules defines the carrier as "includ[ing] the owner or the charterer who enters into a contract of carriage with the shipper" and so the actual carrier is not included. However, art. 11 contains a departure from the rule that the contractual carrier is responsible for the whole carriage performed by the actual carrier and so the contractual carrier can avoid responsibility for the part of carriage performed by the actual carrier if the requirements of art. 11 (1) are satisfied. Therefore, a non- contracting carrier has only the option either to rely upon the bailment on terms doctrine or alternatively to imply a contract on the terms of the bill of lading including the provisions of the Hague- Visby Rules.

5. 6. BAILMENT- THE NATURE OF THE DUTY

Apart from an action in negligence, a claimant may also be able to sue in bailment The nature of the duty owed by the bailee towards the owner of the goods is different from the general duty of care where no bailment is involved. For a cargo claimant an action in bailment has three advantages over an action in negligence. First, the duty of taking care of the goods in bailment, as opposed to negligence, includes not only the obligation to exercise due care for the safety of the goods, but also one of taking all reasonable steps to prevent their theft. Secondly, the bailee for reward is prevented from delegating his responsibility and would be liable for the faults of any independent contractor engaged in the performance of the contract. Thirdly, the bailee, unlike the case in negligence where the burden of proof is on the bailor, will be liable unless he can prove either the lack of negligence on his part where the goods are lost or damaged, or that although he did not take proper precaution the loss would have occurred in any events.[123] This applies equally to actions against a sub- bailee and his duty would be that of a bailee for reward, despite the fact that the consideration will move from the bailee to the sub- bailee. In the words of Lord Goff of Chieveley in *The Pioneer Container*

> Their Lordships . . . consider that, if the sub- bailment is for reward, the obligation owed by the sub- bailee to the owner of the goods must likewise be that of a bailee for reward notwithstanding that the reward is payable not by the owner but by the bailee.[124]

There is, initially, no relationship between the owner of the goods and the sub-bailee. But taking possession of the goods, voluntarily by the sub- bailee, with the acknowledgement that they belong to some one else than the bailee, will make the sub-bailee owe duties towards the intermediate bailee as well as towards the principal bailor,

---

[123] For more details about the bailee's duty see Baughen, S., "Bailment continuing role in cargo claims" [1999] LMCLQ 393 at pp. 394- 395; Devonshire, P., "Sub- bailment on terms and the efficacy of contractual defences against a non- contractual bailor" [1996] JBL 330 at 331 at 340- 343 and Wilson, J. F., "A flexible contract of carriage- the third party dimension?" [1996] LMCLQ. 187 at 193- 194.
[124] [1994] 1 Lloyd's Rep. 593 at 599.

the owner of the goods.

The Privy Council, in *The Pioneer Container*, considered the nature of the sub-baillee's duty toward the principal bailor in cases such as the former is unaware of the existence of the principal bailor and believes that the goods are his bailor's goods. It was held that, the sub- bailee would not owe a bailee's duty toward the principal bailor, on the assumption that the sub- bailee could not have voluntarily taken the principal bailor's goods into his possession and so the sub- bailee would not be liable to the principal bailor where the goods were lost or damaged want of care. However, this *dictum*, arguably, contradicts the Court of Appeal decision in *Awad .v. Pillai*, where it was held that sub-bailee owes the principal bailor a general duty of care in negligence.[125] As a result of the existence of a sub- bailment for reward, the sub- bailee owes a duty of a bailee toward the owner, despite the fact that the bailee's duty may be less than that of the sub- bailee's. This is because the principal bailee can modify or negate his duty according to his contract with the cargo owner. But, the sub- bailee's ability to rely on the terms of the sub- bailment depends on the bailor's consent to the terms of the sub- bailment (or the on ostensible authority of the bailor). Therefore, the court should not prevent the sub- bailee invoking the terms of his contract with the head bailee, as a result of the nature of the sub-bailee's duty, provided the bailor has consented to such terms. [126]

5. 6. 1. LEGAL AND PHYSICAL POSSESSION

Next, one needs to consider the extent to which the acquisition of physical possession is necessary to constitute a party as a bailee. A person to be qualified as a bailee should acquire legal possession of the goods and so a person having at the most custody of the

---

[125] [1982] R.T.R. 266. Therefore, the nature and the extent of the sub- bailee's liability needs definition, as does the sub- bailee's ability to rely on the terms of his contract against the principal bailor in the absence of a sub- bailment from which those terms may be incorporated. See Bell, A., "Sub- bailment on terms: A new land mark, *The Pioneer Container*" [1995] LMCLQ. 177 at 182.

[126] See Devonshire, P., "Sub- bailment on terms and the efficacy of contractual defences against a non-contractual bailor" [1996] JBL 330 at p. 342.

goods for strictly limited purpose would not be qualified as a bailee. Therefore, carriers and warehousemen would be qualified as bailees since they would have acquired legal possession of the goods. Stevedores who are engaged only to load or discharge the goods would not be considered as bailees since they have the custody of the goods for strictly limited purpose, such discharging the goods. In contrast, stevedores could be qualified as bailee if they are warehousing the goods until the time of collection by the consignee or his agent. On those facts, there would be an intention that the stevedore should acquire legal possession of the goods and so, as bailee, he would owe a duty of care towards the owner of the goods.[127] The Court of Appeal dealt with this issue in *Lotus Cars Ltd. and Others .v. Southampton Cargo Handling Plc. and Others and Associated British Ports, The Rigoletto*,[128] where the stevedores company (SCH) received the cars six days before the scheduled loading of *Rigoletto*, and in the meantime had to store them in the compound. Accordingly, Rix L.J., held that "In the present case, however, SCH were the 'receiving authority' who received the goods for shipment and were obliged to take care of them, subject to their conditions, which *inter alia* plainly contemplated that goods might be in the possession of SCH and subject to a particular and general lien".[129] However, Rix L.J., distinguished the present case from *Midland Silicones Ltd. v. Scruttons Ltd.*, on the ground that "In my judgment, Viscount Simond's *dictum* effectively treats a stevedore in the classic situation as an example of a relationship where possession of the chattel is not transferred, but the things is merely handled or used for some temporary purpose".[130] Therefore, if stevedores are not acquiring the legal possession of the goods, they should seek protection throughout the Himalaya clause.

---

[127] The Privy Council in *Gilchrist Watt .v. York Products*, [1970] 1 W.L.R. 1262, recognised the creation of a sub- bailment of the goods when the independent contractor owed the duty of taking care of the owner's cargo and took legal possession of the cargo.
[128] [2000] 2 Lloyd's Rep. 532 at para. 42.
[129] *Ibid.*
[130] *Ibid.*

In *Spectra International PLC .v. Hayesoak LTD.*,[131] Mr. Thomas, argued that, there was no bailment relationship between Spectra and Frans Maas, because they never had actual or physical possession of the goods. The above point was addressed in *The Pioneer Container*, and The Privy Council dismissed the propositions on the ground that the bill of lading issued by Scandutch in respect of the goods represented that Scandutch had received them for transportation from the place of receipt and no evidence was adduced to contradict this statement. The Privy Council added

> it is difficult to see why the shipowner should not, when they received the goods of the Scandutch's plaintiff into their possession, have become responsible as bailees to the owner of the goods even if the goods were never in the possession of Scandutch and, if so, it is not easy to see they should not be able to invoke against the owners and terms which the intermediary (Scandutch), with the owner' consent, intrusted the goods to them.[132]

5. 6. 2. BAILMENT AND SUCCESSORS IN TITLE

Suing in negligence depends on the claimant's having ownership or constructive possession at the time when the loss or damage to the goods occurred. Therefore, suing in negligence will not always be available to a successor in title to the original shipper. Can such a claimant sue in bailment instead? This depends on the establishment of the attornment by the bailee or his sub- bailee to the successor in title.[133] An attornment requires the bailee to acknowledge that he now holds the goods on behalf of the successor in title. An attornment is still required even though the claimant has acquired constructive possession by transfer of the bill of lading, which would enable him to sue in negligence if the loss or damage occurred after such transfer. The need for an attornment is supported by the decisions in *The Captain Gregos (No. 2)*[134], *The Gudermes*[135] and *The Future*

---

[131] [1997] 1 Lloyd's Rep. 153. This case will be discussed in details in chapter 6.
[132] See *supra* fn. 124 at 604.
[133] In *The Aliakmon*, [1986] 1 A.C. 785 at 815, Lord Brandon concluded that attornment is necessary in order for the bailment on terms to take place between the shipowners and the buyer.
[134] [1900] 2 Lloyd's Rep. 395, at 405- 406.

Express.[136] However, McMeel suggests[137] that attornment is not needed where the goods are carried under a bill of lading which is a document of title, in particular in the light of s. 29 (4) of the Sale of Goods Act 1979. He, then, criticised the above maritime authorities, which suggest the contrary as "they are introducing unnecessary refinements and are unsound".[138] In *The Starsin*[139] Colman J., held that the bailment action failed through the lack of attornment. However, Lord Hobhouse expressed the view that no attornment by the sub- bailee to the goods owner is necessary. [140] Mance LJ in *East West Corporation .v. Dkbs 1912*,[141] averted to the issue noting that Carver suggests[142] that a transferable attornment may apply in favour of successors in title under a bill of lading. A wider judicial acceptance to a transferable attornment would allow successful actions in bailment by claimants who had been divested of their contractual rights under the bill of lading contract and who would be unable to recover in negligence. It would also allow recovery by the consignee who endorsed the bill to an agent. This is because such consignee would not be able to show that it had occurred proprietary or possessory rights in the goods at the time of the carrier's breach of duty and so it would be unable to proceed in negligence, but it would still be able to proceed and recover in bailment.

This requirement will not be needed where the plaintiff is the original shipper as in *The Pioneer Container*.[143] Therefore, delivery of the goods against the presentation of the bill of lading will not be considered as attornment, since it cannot be seen as an express undertaking by the bailee to hold the goods on behalf of the successor in title of the

---

[135] [1993] 1 Lloyd's Rep. 311.
[136] [1993] 2 Lloyd's Rep. 542.
[137] McMeel, G., "The Redundancy of Bailment" [2003] L.M.C.L.Q. 169 at 196.
[138] *Ibid*. at 197.
[139] See *supra* fn. 107 at 101- 102.
[140] [2003] 2 W.L.R. 711 at para. 136, ([2003] UKHL 12).
[141] [2003] 1 Lloyd's Rep. 239 at para. 42, ([2003] EWCA Civ 83).
[142] See Sir Treitel, G., & Reynolds, F.M.B., *Carver on Bills of Lading*, 1st. Edition, London: Sweet & Maxwell 2001, at pars. 7- 037- 7- 042.
[143] See *supra* fn. 124. Attornment was not an issue, but it appears that taking possession of the goods by the sub- bailee will trigger the latter's duty towards the owner.

original shipper. But, what of delivery of the goods without the presentation of the bill[144] or delivery of the goods against a document not included by COGSA 1992 Act, which will not allow the goods' owners to have a cause of action by virtue of s. 2 (1)? The courts might well consider both these types of delivery as an attornment which will enable the goods' owner to bring an action within the bailment on terms doctrine.

In *Sonicare International LTD .v. East Anglia Freight Terminal LTD.*,[145] Sonicare, the plaintiffs, agreed with Metero to purchase 1000 radios and pursuant to that agreement, Metero's suppliers shipped the goods in question on board Dragon Sumatra at Tanjung Priok for carriage to Jakarta and then for on- carriage to Felixstowe for ultimate delivery in Southampton. A combined bill of lading was issued by the second defendants, freight forwarder, VTP. The later sub- contracted with NOL to carriage the goods from Jakarta to Felixstowe. NOL issued bill of lading naming VTP as shipper and PFE as consignee. NOL engaged with EAFT, the first defendants, for the purpose of warehousing and clearing facilities at Felixstowe. Sonicare, the plaintiffs, sought to recover from EAFT, the first defendants, for the loss of 50 cartons that went missing from their warehouse.

Hallgarten J., held that the negotiation of the bill of lading would create a simple bailment between the bailee and the sub- bailor, Sonicare, and he then states that

> But, if, as in the present case the original bailor has caused the benefit of the contract representing the head bailment to be assigned - i.e. by negotiation of the VTP bill of lading - then it seems to me that the transferee does indeed step into the shoes of the original bailor and is to be treated to all intents and purposes as the bailor.[146]

The combined bill of lading had been negotiated to Sonicare prior to the demand for delivery and thus they were fully vested with a claim in bailment against the first defendants, EAFT.

---

[144] As in *The Gudermes*, [1993] 1 Lloyd's Rep. 311, *The Captain Gregos (No. 2)*, [1900] 2 Lloyd's Rep. 395, and *Sonicare International Ltd . v. East Anglia Freight Terminal Ltd.*, [1997] 2 Lloyd's Rep. 48.
[145] [1997] 2 Lloyd's Rep. 48.
[146] *Ibid.* at 53.

As alternative route to the simple bailment, Hallgarten J., held that EAFT attorned directly to Sonicare upon the acceptance of release/ removal authority and therefore, the successor in title was owed a duty of care in bailment by the sub- bailee.[147] Importantly, Hallgarten J., took the view that once there was an attornment the successor in title could sue for pre- attornment loss without having to show it had become successor in title at the time of the loss. This is critical distinction from the position in negligence and a distinct advantage to a claimant. Therefore, proceeding in bailment has substantial advantage over proceeding in negligence other than the relevant burden of proof. Had the plaintiffs in *The Starsin* been able to establish an attornment then they might well have been able to recover in bailment what they were unable to recover in negligence. Proceeding in bailment will, therefore, enable claimants to claim in respect of pure economic loss.

The need for attornment would be magnified by a chain of sub- bailees, since the goods' owner would not be able to prove that the loss or damage to the goods occurred while were in the custody of the attorning bailee. There is a suggestion that delivering the goods would be with the authority of the head bailee which would bind him by the sub-bailee's attornment and so becoming liable to the successor in title. [148]

5. 6. 3. THE OVERALL ROLE OF BAILMENT

Bailment is important to three cases of cargo owners who are not with the ambit of COGSA 1992. First, there is the cargo owner with an electronic bill of lading who would not be able to sue the carrier, since this document is not included by the 1992 Act on the ground that it is neither in a written form nor is signed.[149] The provisions of Contracts (Rights of Third Parties) 1999 Act are not applicable to a carriage contract embodied into

---

[147] [1997] 2 Lloyd's Rep. 48 at 53.
[148] See Baughen, S., *supra* fn. 123 at 398.
[149] See Faber, D., "Electronic Bills of Lading" [1996] LMCLQ 232; Baughen, S., *ibid* at 398.

an electronic bill of lading, by virtue of s. 6 (6), on the ground that this bill is included by the provisions of the 1992 Act. However, the application of the 1992 Act to this document is, by virtue of s. 1 (5), conditional on regulations made by the Secretary of State. No such regulations have yet been made. As has been mentioned before,[150] the involvement of the shipowner in the process of transmitting the private codes, directly or indirectly through its agent 'Title Registry', under the Bolero System, to enable the transferee to take delivery of the goods might well constitute an acknowledgement by the shipowner to the transferee's possessory title to the goods represented by the electronic bill of lading. Such acknowledgement by the shipowner might well be considered as an attornment by the shipowner, as a bailee, to the transferee and so giving the transferee rights of suit in bailment.

Secondly, there is the cargo owner with possession of either a charterer's bill of lading who wants to sue the shipowner as a bailee of the cargo he carries. Delivering the goods to the holder of the charterer's bill of lading according to the charterer's order might also be constituted as an attornment to the successor in title of the original bailor.[151]

Thirdly, there is the cargo owner in possession of a freight forwarder's bill of lading who wants to sue the freight forwarder[152] or his sub- contractor. This is because the application of s. 2 (1) of COGSA 1992 to this document is uncertain as a result of the uncertainty as to whether this document qualifies as a document of title.[153] The freight forwarder might be considered as a bailee on the ground of having contractual control over the goods, even if he has no physical custody of them. The need of attornment could create a problem to the successor in title to the shipper in the case of a chain of sub- bailees. However, this problem, arguably, might be resolved by considering the delivery of the

---

[150] See chapter four on the electronic bill of lading.
[151] But, against this, there is the finding of Colman J., in *The Starsin* that there was no attornment by the shipowner.
[152] See *Spectra International Plc. v. Hayesoak Ltd*, [1997] 1 Lloyd's Rep. 153.
[153] For more details see sub- title 2. 5. 2 of chap. 2.

goods against those bills to the successor in title as attornment which would be upon the head bailee's instruction which would also be bound to the sub- bailee. In addition, an action against a sub- bailee will help a cargo owner who wishes to sue a second carrier in whose custody the goods are lost or damaged following a transhipment. Delivering the goods to the holder of the first carrier's bill of lading might be viewed as an attornment to the holder of that bill so as to found a claim in bailment in respect of the post- transhipment events, provided that the sub- carrier is aware that the goods belong not to the first carrier.

Fourthly, there is the claimant that has mistakenly surrendered its contractual rights by triggering s. 2 (5) of the 1992 Act, such as the shipper in *East West Corporation .v. Dkbs 1912*.[154] The shipper procured the issue of bills of lading naming its bank as consignee. Although the bank acted solely as the shipper's agent, on receipt of the bills it became the 'lawful holder' and the shipper lost its contractual rights by virtue of s. 2 (5). The shipper recovered from the carrier in bailment in respect of the misdelivery of cargo.

5. 7. THE HAMBURG RULES

Under art. 10 (1) of the Hamburg Rules the contracting carrier remains responsible for the entire carriage of the goods, even though the performance of the whole or part of the carriage thereof has been entrusted to an actual carrier. The actual carrier is protected under the Hamburg Rules, by virtue of art. 10 (2), since the actual carrier's responsibility is governed by the provisions of the Rules. But art. 11 (1) of the Rules contains a departure from the rule that the contracting carrier is responsible for the whole carriage performed by an actual carrier, and so the contracting carrier can avoid responsibility for the part of carriage performed by the actual carrier where the requirements of art. 11 (1) are satisfied. The contracting carrier will have the benefit of this departure if the carriage contract provides "explicitly that a specific part of the carriage covered by the said contract is to be

---

[154] See *supra* fn. 141.

performed by a named person other than the carrier". Moreover, the contracting carrier is allowed to include a clause into the carriage contract which provides that "the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of carriage". Therefore, the tranship and cesser clauses are accepted under the Hamburg Rules as long as "judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of Article 21". The enactment of the Hamburg Rules, into English law, would reduce, if not entirely eliminate, the need for the doctrine of bailment and sub-bailment on terms.

5. 8. THE DRAFT INSTRUMENT

The Draft Instrument adopts a scheme of dual liability that is similar to that to be found in the Hamburg Rules. Instead of the 'contracting carrier' and the 'actual carrier', it refers to the 'carrier' and the 'performing party'. Under art. 6 (3) (1) (a) the performing party is "subject to the responsibilities and liabilities imposed on the carrier under this Instrument ....". Under art. 6 (3) (2) (a) the carrier remains responsible for the acts or omissions of the performing party.

Article 6 (3) (1) provides that

> "(a) A performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier's rights and immunities provided by this instrument (i) during the period in which it has custody of the goods; and (ii) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage. (b) If the carrier agrees to assume responsibilities other than those imposed on the carrier under this instrument, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods is higher than the limits imposed under articles 6. 4. 2, 6. 6. 4, and 6. 7, a performing party is not bound by this agreement unless the performing party expressly agrees to accept such responsibilities or such limits".

The effect of art. 6 (3) (1) (a) is to treat a performing party falling within art. 1 (17) as a carrier during the period of its responsibility. It is arguable, however, that the two sub-rules of art. 6 (3) (1) (a) relating to the period of responsibility can be substituted and defined as "from the time when the carrier or a performing party has received the goods until the time when the goods are delivered to the consignee" in coherence with art. 4 (1) (1). Moreover, art. 6 (3) (b) provides that the carrier's agreement which increased his responsibilities and the limits of liabilities would not bind to a performing party, unless the latter agreed to accept such responsibilities or such limits. It is noticeable that art. 6 (3) (b) fails to mention where such agreement should be recorded, with whom the performing party would expressly agree and who would be entitled to enforce such agreement.[155] It is arguable that, the initial agreement as to increase both the responsibilities and the limits of liability would be between the contracting carrier and the shipper and so to trigger the application of art. 6 (3) (1) (b) the initial agreement should also be recorded in the agreement between the contracting carrier and the performing party. Moreover, such secondary agreement should provide that the parties who would be entitled to enforce such agreement are the contracting party and the shipper including his successor.

The definition of a 'performing party' under the Draft Instrument differs from the definition of an 'actual carrier' under the Hamburg Rules. The definition is not limited to sub- carriers and covers a far wider range of sub- contractors. Article 1 (17) defines the 'performing party' as

> "a person other than the carrier that physically performs [or fails to perform in whole or in part] any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control,

---

[155] See the comments on text of the UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc. A/CN.9/WG.III/WP.21/Add.1, (15- 26 April 2002), (Hereinafter U.N. Doc. A/CN.9/WG.III/WP.21/Add.1) at para. 70. The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

> regardless of whether that person is a party to, identified in, or has legal responsibly under the contract of carriage. The term "performing party" does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee"

However, a performing party would only cover a person who physically performs or fails to perform the carrier's obligations namely "carriage, handling, custody, or storage of the goods". Therefore, a performing party who is performing one of the carrier's obligations other than those specified in art. 1 (17), such as a security company guarding a container yard, would not be included by the definition of the performing party under art. 1 (17). In addition, a party who undertakes to perform or to procure the performance of one of the carrier's obligations, mentioned in the definition, such as a sub- contracting ocean carrier who has sub- contracted the performance of its obligations, would not be included by the definition.

However, it is arguable that if the Draft Instrument adopted the broad definition which provided that "a person that performs, or undertakes to perform, or procures to be performed any of the carrier's responsibilities under a contract of carriage, to the extent that"[156] would avoid the great deal of complication and uncertainty created by art. 1 (17). The suggested broad definition is similar to the definition of the "actual carrier" adopted by the Hamburg Rules under art. 1 (2).

Moreover, to distinguish between sub- contractors who actually perform and those who undertake to procure performance of any of the sub- contracted obligations seems unjust and artificial. This is because the so- called parties outside the definition of the 'performing party' would be entitled to the benefit of "the defences and limitations of liability available to the carrier under this instrument" without bearing any responsibilities,

---

[156] See UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc. A/CN.9/WG.III/WP.21, (15- 26 April 2002), (Hereinafter U.N. Doc. A/CN.9/WG.III/WP.21) at para. 14. The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

under art. 6 (3) (3) which provides that "If an action is brought against any person, other than the carrier, mentioned in article 6. 3. 2, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if it proves that it acted within the scope of its contract, employment, or agency". According to art. 6 (3) (2) (a) (ii), these persons are "any other person, including a performing party's sub- contractors and agents, who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, as if such acts or omissions were its own". The words "any other person" would apparently include a sub- contractor of the carrier who further sub- contracts the performance of his obligations to another party and a party performing other functions under the carriage contract than those mentioned in art. 1 (17).[157] As a result of the complexity and the restrictive nature of art. 1 (17), the identity of the performing party would be difficult to be ascertained by the cargo claimant within the one- year time limit. This is because the liability of the performing party depends on a claim being brought against the right party in the right jurisdiction within that short period of time.

Period of responsibility

Article 4 (1) (1), provides that "Subject to the provisions of article 4. 3, the responsibility of the carrier for the goods under this instrument covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee". The period of responsibility, under art. 4 (1) (1), would be wider than that of the Hague- Visby Rules, 'tackle to tackle', and the Hamburg Rules, 'port to port'. Accordingly, the period of responsibility of the carrier or the performing party would cover the period from the actual receipt to the actual delivery of

---

[157] For the support for this view see the comments on text of the CMI Rules (U.N. Doc. A/CN.9/WG.III/WP.21/Add.1) at para. 72 and at para. 75.

the goods to the consignee and so to include the period of taking the goods at inland point, unlike the Hamburg Rules.[158] Where multimodal carriage is involved, provision has to be made for the relationship between the Draft Instrument and other international transport conventions, such as COTIF and the CMR. This is achieved by art. 4 (2) (1). The commentary on this article states, "This article deals with that problem and provides for a network system, but one as minimal as possible. The draft instrument is only displaced where a convention constituting mandatory law for inland carriage is applicable to the inland leg of a contract of carriage by sea, and it is clear that the loss or damage occurred solely in the course of the inland carriage. This means that where the damage occurred during more than one leg of the carriage, or where it cannot be proved where the loss or damage occurred, this draft instrument will prevail during the whole door to door transit period".[159]

However, the period of responsibility under the Draft Instrument, by virtue of art. 4 (1) (2 & 3) can be shortened according to the parties agreement, in the absence of such agreement by the customs, practices or usages in the trade and in the absence of both such agreement and such customs, or practices or usage by the time of actual taking custody of the goods by the carrier or the performing party. Clausing the transport document or the electronic record by terms which minimise the period of responsibility should not arguably be considered as disadvantageous on the ground that it would reflect the parties' freedom to the carriage contract as to allocate the responsibilities for various tasks in the carriage. Moreover, art. 4 (1) (2) and (1) (3) is incoherent with art. 5 (2) (2) which provides that "The parties may agree that certain of the functions referred to in article 5. 2. 1. shall be performed by or on behalf of the shipper, the controlling party or the consignee. Such agreement must be referred to in the contract particulars" and which gives the parties the

---

[158] For the opposite point of view see (U.N. Doc. A/CN.9/WG.III/WP.21/Add.1) at para. 42.
[159] See (U.N. Doc. A/CN.9/WG.III/WP.21) at para. 49.

freedom to allocate the responsibilities for various tasks in the carriage which are not performed by the carrier.[160] These clauses are effective under the Hague and Hague- Visby Rules, in most jurisdictions, as well as under the Hamburg Rules. However, the period of responsibility should not be left to be decided according to the customs, practices and usages which would create uncertainty as to which custom, practice or usage is applicable. Also, the draftsmen of the Draft Instrument should use the same criterion as to where parties' agreement must be referred to as in art. 5 (2) (2) which provides that "Such agreement must be referred to in the contract particulars", which would put a third party on a notice of such agreement.

As has been mentioned above, by virtue of art. 5 (2) (2), the parties to the carriage contract are free to allocate the responsibilities for certain duties, such as loading and discharge operations, under art. 5 (2) (1) between themselves and that allocation must be referred to the contract particulars. In the absence of such agreement, shipowners will bear the responsibilities of the performance of such operations by virtue of art. 5 (2) (1). Clausing the bill of lading to that effect would not cause a problem as long as it is referred to the contract particulars which would put the shipper, the controlling party and the consignee on notice. The shipping practice, nonetheless, is not so straight as it seems since the allocation of responsibilities for these duties would be referred to in the charter- parties, FIOS or similar clauses, rather than the bill of lading, as they are the charterer's responsibilities. Would the incorporation of the charter- party's terms, including a clause

---

[160] Under English law see *G. H. Renton .v. Palmayra Trading Corporation of Panama*, [1957] A.C. 147 at 174, where it was held that the aim of art. II of the Hague Rules is to give the parties to the carriage contract the rights to decide which particular functions should be performed by the carrier, and so the performance of any of the designated functions by the carrier, should be governed by the Hague Rules. Therefore, the effect of art. III (2) of the Rules is only to prevent the carrier from contracting out of liability where he undertakes the performance of one of those functions but not to specify those functions. The Court of Appeal has recently in *The Jordan II*, [2003] 2 Lloyd's Rep. 87 at pars. 34, 47 and 48, ([2003] EWCA Civ 144), confirmed that this reasoning means that a clause allowing responsibility for loading and stowing to the shipper, and for discharge to the receiver, means that the shipowner assumes no responsibility for these activities under the bill of lading.

such as FIOS, into the bill of lading be effective, under art. 5 (2) (2) and art. 17 (1), as against a third party? One could argue that such a general incorporation would not fulfil the requirement, mentioned in art. 5 (2) (2), which demands such agreement to the allocation of responsibilities of certain duties must be referred to in the contract particulars. Moreover, such a general incorporation should be considered as an allocation of responsibilities to a non- contractual party, away from the shipowner, rather than a true allocation of responsibilities according to art. 5 (2) (2). If one could argue that such general incorporation is no more than an exception clause in favour of the shipowner, it should be considered as an agreement to exclude and to limit the carrier's liabilities under the Draft Instrument and thus null and void by virtue of art. 17 (1).

Transhipment

Article 4 (3) covers mixed contracts of carriage and forwarding, with art. 4 (3) (1), providing that "The parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods the carrier, acting as agent, will arrange carriage by another carrier or carriers". Mixed contracts of carriage and forwarding are commonly used in the liner trade and initially it reflects the parties' freedom as to determine the scope of their agreement. Nonetheless, the parties' freedom as to determine the scope of their agreement should be *expressly* reflected in the carriage contract in order to protect shippers and their consignees. Therefore, any provisions regulating the mixed contracts of carriage and forwarding should be carefully drafted so as to avoid any kind of uncertainty and ambiguity and to provide an equal protection of the interests of all parties, in particular cargo owners. Looking at common shipping practice, mixed contracts of carriage and forwarding are covered by standard terms so- called liberty to tranship and cease of liability clauses which are issued by the carrier without any form of negotiation

and dangerously might leave the cargo owner without contractual remedy against both carrier in cases where the loss or damage is sustained after transhipment.

The above standard terms, liberty to tranship and cesser of liability clauses, would be excluded from the ambit of art. 4 (3) (1) as drafted because these clauses do not indicate that these clauses were the subject to discussion between the parties and that they were accepted by them. Moreover, such clauses normally would not specify which part or parts of the transport would be carried out by the sub-carrier.[161] One could argue, however, that art. 4 (3) (1) could be drafted in a better way by requiring the recording of the name of the sub- carrier who will perform the specific part or parts of transport, like art. 11 (1) of the Hamburg Rules, which can be used as an indication of the fulfilment of requirement of '*expressly* agree'. The requirement of recording the name of the sub- carrier plays an important role in relation to art. 14 (1) relating to the one year time limit. This is because a successful claim against the second carrier depends on the cargo claimant establishing a claim in the right jurisdiction within the one year time limit which might leave the cargo owner without a remedy, unlike art. 11 (1) of the Hamburg Rules which provides that "Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of Article 21". Moreover, art. 4 (3) (2), which provides that "In such event the carrier shall exercise due diligence in selecting the other carrier, conclude a contract with such other carrier on usual and normal terms, and do everything that is reasonably required to enable such other carrier to perform duly under its contract", does not require the head carrier, acting as agent, to obtain a transport document or to handle such document to the shipper or the consignee.

---

[161] For the opposite point of view, (U.N. Doc. A/CN.9/WG.III/WP.21/Add.1) at para. 45.

Obtaining a transport document is vital for establishing the carrier responsible for the loss or damage of the goods, under which carriage contract and under which regime. This is because the burden of proof of the head carrier's negligence would be on the shipper, the controlling party or the consignee in the case of loss or damage to the goods, by virtue of art. 6 (1) (3) (ix), resulting from "handling, loading, stowage or unloading of the goods by or on behalf of the shipper, controlling party or the consignee". In contrast, art. 11 (1) of the Hamburg Rules provides "The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier". However, the head carrier, acting as agent, would not be liable for the defaults of the sub- carrier by reason of art. 6 (3) (2) (a) since he would not be qualified as a performing party under art. 6 (3) (2) (a) (i), by virtue of the words of art. 1 (17) which provides that "any of the carrier's responsibilities under a contract of carriage" and so the sub- carrier's defaults would not be one of the head carrier's responsibilities under the head carriage contract. Also, the sub- carrier would not be considered as "any other person, including a performing party's sub- contractors and agents" under art. 6 (3) (2) (a) (ii), by virtue of the words "who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage" since what the sub- carrier performs or undertakes to perform is not part of the head carrier's responsibilities under the head carriage contract but rather under one the sub- carrier's responsibilities under his sub-carriage contract.

CHAPTER SIX: LIMITING CLAIMS OUTSIDE COGSA 1992

6. 1. INTRODUCTION

A coherent system of shipping law needs not only to enable those who suffer loss to have adequate means of recovery from sea carriers, but also needs to be able to confine any recovery within the scheme set out by international conventions such as the Hague Rules. Recovery from parties that fall outside those conventions will tend to undermine the uniformity of their application. The point was made by Lord Steyn in *The Nicholas H* as follows,

> "The dealings between shipowners and cargo owners are based on a contractual structure, the Hague Rules, and tonnage limitation, on which the insurance of international trade depends . . . . . The result of a recognition of a duty of care in this case will be to enable cargo owners, or rather their insurers, to disturb the balance created by the Hague Rules and the Hague- Visby Rules as well as by tonnage limitation provisions, by enabling cargo owners to recover in tort against a peripheral party to the prejudice of the protection of shipowners under the existing system"[1]

As has been mentioned in the previous chapter, the courts' decisions on the implied contract cases created many limitations on the scope of the implied contract doctrine which made implied contract less viable as a means of solving the problems of title to sue by third parties. Moreover, the Contracts (Rights of Third Parties) 1999 Act, even if it is applicable to such cases, would only allow third parties to acquire the benefits of carriage contracts but would not impose any liabilities on third parties. To do so a new mechanism would be required. It is, therefore, necessary to consider the means by which the English courts can confine non- contractual claims within the ambit of the Hague and the Hague- Visby Rules.

---

[1] *Marc Rich & Co. A.G. v. Bishop Roch Marine Co. (The Nicholas H)*, [1996] A.C. 211 at 239D, and 240C.

6. 2. BAILMENT AND SUB- BAILMENT ON TERMS [2]

The bailee's duties may be modified or negated by the terms of the head bailment as set out in the head contract of carriage. This situation is of little importance as, generally, the bailment on terms will be subsumed by the contract of carriage. Possession generally will follow the contractual rights. However, in the case of an agent who obtains a bill of lading in which it is named as consignee, or in the case of a bill of lading which is personally indorsed to it, this will not be the case. The agent will have contractual rights under COGSA 1992 and the principal will have rights in bailment. Therefore, in *East West Corporation .v. Dkbs* 1912, the seller lost its contractual rights under COGSA 1992 when it transferred the bill to its agent as consignee. However, the seller still retained its right of suit in bailment and therefore was able to recover damages in respect of a mis- delivery from the carrier.[3] The sub- bailee's duties may also be modified of negated by reference to the terms of the sub- bailment in their contract with the bailee, provided the bailor has consented to those terms. The defendant here seeks to rely on the terms of his own contract to which the claimant is not a party. There is also an intermediate category where a bailee seeks to rely on the terms of the head bailment, even though he is a stranger to the contract of setting out the terms thereof. This will happen when a shipowner is sued in bailment and seeks to rely on the terms of a charterer's bill of lading. In this situation, unlike sub-bailment, the defendant will seek to rely on the terms of a contract to which it is not party; the carriage contract between the charterer and the claimant.

6. 2. 1. THE BAILOR'S CONSENT AS THE FOUNDATION OF THE APPLICATION OF THE SUB-BAILMENT'S TERMS

Transferring the goods to the hands of a third party will create a bailment relationship

---

[2] Wilson, John F., "A flexible contract of carriage- the third party dimension?" [1996] LMCLQ. 187.
[3] [2003] 1 Lloyd's Rep. 239 at pars. 44- 49, ([2003] EWCA Civ 83).

between the later and the cargo owner which will be called a sub-bailment on terms.[4] In *Morris .v. Martin & Son Ltd.*,[5] the plaintiff sent a mink stole to a furrier, and the latter, with the consent of the owner, gave the stole to reputable cleaner, the defendant. The agreement between the furrier, as principal bailee, and the defendant, as a sub- bailee, was subject to the conditions of trade. Those conditions of trade excluded the liability of the defendant, as a cleaner, for damage to or loss of the stole. An employee stole the mink stole, while it was in the defendant's possession. The Court of Appeal had to decide whether the plaintiff could sue the cleaners direct.

According to Lord Denning M.R., no direct contractual relationship existed between the cleaners and the plaintiff, the owner, but the cleaners would be liable for their employee's conversion. This was because, they owed a duty to take a reasonable care of the fur, not only towards the intermediate bailee, but also towards the principal bailor, the plaintiff.[6] Under Lord Denning's *dictum*, the relationship between the plaintiff and the cleaners was one of sub- bailee and bailor. But when will the plaintiff be bound by the terms of the sub- bailment between the principal bailee and the sub- bailee? Lord Denning concluded that, the principal bailor will be bound by the terms of the secondary contract if he had consented to it. In the words of Lord Denning

> The owner is bound by the conditions if he has expressly or impliedly consented to the bailee making a sub- bailment containing these conditions, but not otherwise [7]

The consent of the bailor plays a very vital role in the doctrine of bailment on terms and the Court of Appeal supported this formulation in *Compania Portorafti Commerciale S.A.*

---

[4] If the sub- bailee believes that the goods belongs to the head bailee rather than to a different person, he owes the undisclosed owner of the goods no more than a duty in common negligence to take a reasonable care of the goods while they are in his possession. See *Awad .v. Pillai and Another*, [1982] R.T.R. 291. (C.A.)

[5] [1965] 1 Lloyd's Rep. 63.

[6] Devonshire, P., "Sub- bailment on terms and the efficacy of contractual defences against a non- contractual bailor" [1996] JBL 330 at 331.

[7] See *supra* fn. 5 at 72.

> like Lord Justice Salmon in Morris .v. Martin..... we would, if it were necessary to decide the question, be strongly attracted by the rule adumbrated by Lord Denning M.R. in that case that if A bails his goods to B and B, with his consent and knowledge, sub- bails the goods to C on terms, A is bound by these terms in any claim he may make against C.[9]

The most important terms to be invoked by a sub- bailee would be exemption clauses, limitation of liability and the time bar provisions, contained in the sub- bailment contract. As has been noted above, in *Morris .v. Martin*, the consent of the principal bailor is the basis for the sub- bailee's entitlement to invoke any term of the sub- bailment between him and the principal bailor. The bailor's consent, according to Lord Denning *dictum*, may be expressed or implied in the head contract and there would be no problem, as in *The Pioneer Container,* where the bailor, the owner of the goods, has consented expressly that the bailee could sub- contract "on any terms" the whole or part of the carriage contract to a sub-contractor.

The facts of *Pioneer Container,* [10] put simply, are that the plaintiffs contracted with the carrier to transport their goods and the carrier issued bills of lading to the plaintiffs provided that

> on any terms the whole, or part, of the carriage, loading, unloading, storing, warehousing, or handling.[11]

The carrier contracted with the defendants, sub- contractors, and the latter issued feeder bills of lading containing an exclusive jurisdiction clause. The ship carrying the goods involved in a collision and sank with loss of all the cargo. The plaintiff sued the defendants, shipowner, for the loss by the issue of a writ *in rem* in Hong Kong against a sister ship, *The Pioneer Container*. The defendants sought to a stay the proceedings on the ground of the exclusive Taiwanese jurisdiction clause in the feeder bills. The court held

---

[8] [1990] 2 Lloyd's Rep. 395.
[9] *Ibid.* 405.
[10] [1994] 1 Lloyd's Rep. 593.
[11] *Ibid.* at 597.

that the jurisdiction clause was binding on the plaintiffs but the court declined to stay the proceedings. The Court of Appeal of Hong Kong allowed the defendants' appeal and granted a stay. Therefore, the plaintiffs appealed the decision of the Appeal Court to the Privy Council. Lord Goff of Chieveley observing that

> The difficulty which has arisen with respect to....[the plaintiffs] is that, on ordinary principle of law, there was no contractual relationship between them and the shipowners; and accordingly these two classes of plaintiff have claimed that the exclusive jurisdiction clause, clause 26, is not binding upon them. However, that contention was rejected, both by Sears J. and the Court of Appeal of Hong Kong, on the ground that there was a bailment to the shipowners on terms (including clause 26) which these plaintiffs had expressly or impliedly authorised; and that, on the principle stated by Lord Denning M.R. in Morris .v. CAW. Martin & Sons Ltd... these plaintiffs were bound by clause 26. Whether the courts below were correct in so holding is the principal issue which falls for consideration[12]

The Privy Council, relying on *Morris .v. Martin*, found that there was no contractual relationship between the plaintiffs and the defendants, and their rights and obligations existed independently of contract. The law of bailment governed their relationships with the relation between the principal bailor and sub- bailee being equivalent to that of a bailee and bailor. The question at issue was to what extent the sub- bailee could invoke the terms of the sub- bailment between him and the bailee contained in the feeder bills of lading. In the words of the Privy Council

> if the effect of the sub-bailment is that the sub- bailee voluntarily receives into his custody the goods of the owner and so assumes towards the owner the responsibility of a bailee, then to the extent that the terms of the sub- bailment are consented to by the owner, it can properly be said that the owner has authorised the bailee so to regulate the duties of the sub- bailee in respect of the goods entrusted to him, not only towards the bailee but also towards the owner.[13]

However, there were two conflicting authorities. The first, propounded by Lord Denning M.R., in *Morris .v. Martin*, was that the principal bailor is bound by the terms contained in the sub- bailment to which he has consented to make sub- bailment containing

---

[12] *Ibid.* at 597.
[13] *Ibid.* at 600.

those terms "but not otherwise". The competing strand put forward by Donaldson J., in *Johnson Matthey & Co Ltd. V .Constantine Terminals Ltd,*[14] was that the principal bailor is bound by all the terms of the sub- bailment whether he consented to them or not. Donaldson J., did not consider the principal bailor's consent to be the basis for incorporating the terms of the sub- bailment into the collateral bailment. His view was based on the fact that the principal bailor sues the sub- bailee for breach of his obligation according to the sub- bailment and so the bailor cannot rely on part of the agreement and ignore the rest of that agreement concerned with the limitation of liability or the exemption clause. Moreover, by voluntarily taking possession of the owner's goods, the sub- bailee was aware of his duty towards the principal bailor and then entitled to rely on the conditions on which he undertook that responsibility. In the words of Donaldson J.,

> I really do not see how the plaintiffs can rely upon one part of the contract while ignoring the other.[15]

According to Donaldson J's view, the principal bailor would be bound by the terms of the sub- bailment in two different situations. First, when the principal bailor has authorised the sub- bailment, but the terms of sub- bailment was not authorised. Second, where the sub- bailment was itself unauthorised.[16] Therefore, the sub- bailee could rely upon the terms of his contract with the bailee against in any action brought by the bailor, in certain circumstances, even if the latter had neither known of nor acquiesced in the introduction of those clauses. But, this conclusion depends upon two conditions. First, the clause of the sub- bailment should be an essential part of the sub- bailee's consideration for entering into the sub- bailment contract. The possession of the bailor's goods must be taken upon those provisions, which would define the sub- bailee's liability towards the bailor. Secondly, the bailor must sue the sub- bailee for breach of a duty of taking care which

---

[14] [1976] 2 Lloyd's Rep. 215.
[15] *Ibid.* at 222.
[16] See, also, Bell, A., "Sub- Bailment on Terms: A New Land Mark, *The Pioneer Container*" [1995] LMCLQ 177 at 181 and Swadling, W. J., "Sub- bailment on terms, *The Pioneer Container*" [1993] LMCLQ 9.

would not have come into existence but for the secondary contract.[17]

Nethertheless, *Johnson Matthey & Co Ltd .v. Constantine Terminals Ltd.*, agreed with *Morris .v. Martin* in two aspects. First, that the sub- bailee may be liable directly to the principal bailor, although the decisions disagree on the tactic of incorporating of those terms in the collateral bailment. Secondly, the liability of the sub- bailee may be affected by the terms of the sub- bailment contract.

However, the Privy Council, in *The Pioneer Container*, accepted Lord Denning's *dictum* as to the necessity of consent. On the facts this was present because that the defendants, the carriers, had the right to sub- contract "on any terms" the whole or part of the carriage contract by virtue of the bill of lading terms.[18] Also, it was held that the exclusive jurisdiction clause was consented to by the principal bailor on the basis of the usual and the reasonable test, which is applicable to an express consent as well as to an implied consent. Therefore, the Privy Council, in *The Pioneer Container*, accepted the inclusion of the exclusive jurisdiction clause as a term in the sub- bailment by holding that it was common and reasonable to find such a clause in the container trade[19] and that only an unusual and the unreasonable clause would be excluded from the ambit of such a collateral bailment.

Consent to a term need not be express, but may be implied. The issue of implied consent has been considered in the following three cases. In *Singer (UK) Ltd .v. Tees & Hartlepool Port Authority*,[20] the plaintiff employed a freight forwarder to crate a drilling machine and deliver it to the defendant port authority for shipment to Brazil. The machine was damaged while being loaded by the defendant's servants. The plaintiff sued the

---

[17] Palmer, N. E., "Sub- bailment on terms" [1988] LMCLQ. 466 at p. 448.
[18] Therefore, the Privy Council disagreed with Donaldson's view that the principal bailor would be bound by the terms of the sub- bailment irrespective of the latter's consent.
[19] See *supra* fn. 10 at 605. See also Sing, T. K., "Jurisdiction Clauses in Bill of Lading- The Cargo Claimant's Perspective- *The Pioneer Container*" [1995] LMCLQ 183.
[20] [1988] 2 Lloyd's Rep. 165.

defendant who sought to rely on the limitation of liability clause in their contract with the freight forwarder. The court held that the defendant could invoke the limitation clause against Singer's action. In the words of Steyn, J.,

> . . . . I am. . . . satisfied on the evidence that by entrusting to [the freight forwarder] the package of services involving the carting and delivery of the machines to the ship. Singer conferred implied authority on [the freight forwarder] to create a sub- bailment upon terms which include the port authority's general conditions.[21]

Steyn, J., based the inference of implied consent on Singer's part from the facts of the case. The plaintiff realised that the goods would be delivered to the defendants upon his terms and conditions. As the limitation of liability clause in the sub- bailment was less wide than that inserted in the head contract, Singer would be in no worse position under those terms than under the main contract.[22]

In *Spectra International PLC .v. Hayesoak LT*,[23] the goods were shipped from Hong Kong to Southampton under a bill of lading dated Nov. 20. Spectra, the plaintiffs, instructed Frans Maas, freight forwarders, that the goods, upon clearance, were to be delivered to a Bradford address. Spectra confirmed the instruction by Fax on Dec. 21 which stated

> .... upon clearance .... can you please arrange to delivery to .....[24]

According to Spectra's instruction, Frans Maas sub- contracted the haulage to DRW, a third party, who then sub- contracted the delivery of the goods to Hayesoak. Over a weekend 1050 audio units and seven speakers were stolen from one of Hayesoak's lorries. Spectra, the plaintiff, sued Hayesoak, the defendants, seeking to recover the damages in respect of the loss. The latter admitted liability as a bailee, but submitted that they were entitled to limit their liability under the conditions of Road Haulage Association 1991

---

[21] *Ibid.* at 168.
[22] For more details see Palmer, N. E., *supra* fn. 17 at pp. 467- 468.
[23] [1997] 2 Lloyd's Rep. 153
[24] *Ibid.* at 155.

(RHA conditions) on the basis that the bailment was authorised by Spectra via a chain of intermediaries.

As a result of the absence of privity of contract between them, the main question was whether the defendants, Hayesoak, were entitled to rely on RHA conditions against the plaintiffs,[25] Spectra. According to the Privy Council in *The Pioneer Container*, a sub-bailee could invoke his terms to the extent that the owner of the goods has expressly or impliedly consented to them. From the relevant contract between Spectra and Frans Maas, and from certain documents and the agreed statements,[26] the Court concluded that, the latter were authorised to make a sub- contract with DRW, and that sub- contract would not represent a breach of contract.

However, there was no express consent in accordance with the test of *The Pioneer Container* which authorised the carrier "to sub- contract on any terms". Moreover there was no evidence that the RHA conditions were ever part of any agreement between Spectra and Frans Maas and the BIFA conditions made no reference to any particular terms upon which Frans Maas might sub- contract.[27]

The Court found, in respect of implied consent, that the cargo owners were bound by the terms of the bills of lading to which they were not parties if "in the known and contemplated form"[28] This conclusion was supported by the following observation of Lord Denning MR in *Morris .v. C. W. Martin*

> In this case the plaintiff agreed that [the furrier] should send the fur to the defendants, and by so doing I think she impliedly consented to his making a contract for cleaning on the terms usually current in the trade[29]

The Court, therefore, held that Spectra did impliedly consent to sub- bailment, including

---

[25] The RHA conditions of carriage 1991 have since been revised, in 1998.
[26] Frans Maas are an firm of freight forwarders and Spectra were aware that Frans Maas had no warehousing facilities and so such services would be delegated to others concerns.
[27] See *supra* fn. 23 at 155.
[28] *Ibid.*
[29] See *supra* fn. 5 at 73.

sub- bailment, on terms of the RHA conditions, and the Court regarded those conditions as "usually current in the trade".

Mr. Thomas argued that, according to what Steyn J. said in *Singer*, RHA conditions could only be impliedly consented to if they were less onerous than BIFA conditions in the bill of lading. The Court dismissed the argument on the ground that it was based on a mis-conception of what Steyn J., had said in *Singer*. Steyn J., had concluded that the difference between two sets of terms was unexceptional and rejected the idea that the terms of a sub-bailment could be deemed to have been consented to only where they were less than those in the head contract. Lord Denning, in *Morris .v. Martin*, disregarded the absence of an exclusion clause in the head contract, between the plaintiff and the furrier, as an impediment to the application of the defendants' terms in the sub- contract.[30]

The implied or express consent of the principal bailor does not mean that the consent covers all the terms of the sub- bailment. Such consent would encompass only those contractual provisions, which were reasonable and expected in their context. The Privy Council, in *Pioneer Container,* held in respect of inclusion of the jurisdiction clause in the sub- bailment that it

> would be in accordance with the reasonable commercial expectations of those who engage in this type of trade and that such incorporation will generally lend to a conclusion which is eminently sensible in the context of carriage of goods by sea, specially in a container ship, in so far as it is productive of an ordered and sensible resolution of disputes in a single jurisdiction, so avoiding wasted expenditure in legal costs and an undesirable disharmony of consequences where claims are resolved in different jurisdictions.[31]

Thus, the terms of the sub- bailment might be reasonable and expected in their context, where the exemption and the limitation of liability clauses were less wide than those in the head contract.

---

[30] See *supra* fn. 23 at 156 & 157.
[31] See *supra* fn. 10 at 605.

Finally, there is *Sonicare International Ltd. v. East Anglia Freight Terminal Ltd.*[32] Having found that Sonicare had title to sue in bailment, the court then proceeded to consider whether the defendants could invoke the NAWK conditions, which were part of the agreement between them and NOL, according to the principles set out in *The Pioneer Container*. The court in held that from the relevant facts, there was no express consent by the bailor to the NAWK conditions. Therefore, the court, according to the circumstances set out in the case, concluded that implied consent to the adoption of the conditions was to be deduced. Thus, the defendants could invoke those conditions against the claim, which brought by the plaintiffs on the basis of attornment, which constituted a form of estoppel.

> ..... and in my view any representation that EAFT held the consignment for Sonicare's account was impliedly on the basis such was subject to the terms - i.e. the NAWK conditions - applicable between EAFT and their immediate bailors,[33]

The sub- bailee will be prohibited from using the terms of sub- bailment where the principal bailor has forbidden the bailee from transferring possession to a third party on terms that exclude or limit his liability. But, sometimes, the bailee may have apparent authority to entrust the goods to a third party on terms customarily imposed by the latter. It is hard to prevent the sub- bailee from relying on his contractual terms as a defence to the bailor's action. Therefore, *in Singer*, Steyn J., confirmed that, "ostensible authority may be sufficient to create a sub- bailment contained limitation and exemption clauses".[34] Moreover, The Privy Council, in *Pioneer Container*, agreed with the above approach and Lord Goff remarked that

> Such consent may, as Lord Denning M.R. pointed out, be express or implied; and in this context the sub- bailee may be able to invoke, where appropriate, the principle of ostensible authority.[35]

It is unclear from this passage whether ostensible authority is propounded as component of

---

[32] [1997] 2 Lloyd's Rep. 48.
[33] *Ibid.* at 54.
[34] [1988] 2 Lloyd's Rep. 165 at 168.
[35] See *supra* fn. 10 at 601.

an expanded definition, or whether it is merely inferred from the language of Lord Denning in *Morris .v. Martin.*[36]

6. 2. 2. THE ACCEPTANCE OF THE EXCLUSIVE JURISDICTION CLAUSE AS A TERM IN BAILMENT AND SUB- BAILMENT ON TERMS

Where a charterer's bill is issued, the shipowner will be a bailee of the goods on the terms of that bill. However, unlike a sub- bailment on terms, the bailment will not be subject to any exclusive jurisdiction clause in the charterer's bill of lading. In *The Mahkutai,*[37] Indonesian shipowners chartered their vessel for total period of 24 months to the carrier, an Indonesian corporation. The carrier sub- chartered the vessel to the shippers, Indonesian Timber Exports, for carriage a cargo of plywood from Jakarta to Shantou. The carrier's agents issued a shipping order directing the vessel to receive the plywood cargo for carriage to Shantou subject to the carrier's bill of lading provisions. The master signed the shipping order, which constituted a mate's receipt, and authorised the carrier's agents to sign the bill of lading "in accordance with the mate's receipt and relevant charterparty". The carrier's agents issued the bill of lading provided, *inter alia*, that any dispute should be determined exclusively by An Indonesian Court and governed by Indonesian law, and contained a Himalaya clause.

In Hong Kong, the cargo owner sued the shipowner in respect of the damaged cargo by reason of breach of contract. The shipowners tried to release their vessel which had been arrested as a result of the cargo owner's claim by providing security in the form of a bank guarantee. The shipowners then issued a summons seeking to a stay of proceedings, either on the ground of breach of the exclusive jurisdiction clause in the bill

---

[36] An example of ostensible authority might be where the oral agreement between the shipper and the carrier prevents the transhipment of the goods, but the bill of lading which is issued by the carrier contains a clause allowing the carrier to tranship the goods, and the carrier actually transhipps the goods.
[37] [1996] 3 W.L.R. 1.

of lading, or on the grounds of forum non- conveniens.[38]

The Privy Council faced two issues submitted by the shipowners who were trying to claim either the benefit of the exclusive jurisdiction clause by reason of the Himalaya clause in the time charter's bill of lading,[39] or to invoke the principle of bailment on terms. The shipowners were seeking not to rely on exemptions or limitation clauses which would solely be for their benefit, but on an exclusive jurisdiction clause in the charterer's bill which is for the benefit of both party.[40]

The Privy Council in *The Mahkutai* had to consider to what extent *a bailment on terms* should be regarded as analogous to its decision to *The Pioneer Container* as regards jurisdiction clauses. This issue had already come before the Court of Appeal in *The Forum Craftsman*,[41] where they had refused to allow the shipowners to rely on the exclusive jurisdiction clause in the charterer's bill of lading on the ground of bailment on terms. The issue in *The Pioneer Container* was whether the shipowners could, as sub- bailees, invoke the terms of the sub- bailment against the cargo owner, the head bailor, including the exclusive jurisdiction clause. In contrast, the issue in the present case was whether the shipowners, as sub- contractors, were entitled to rely on a term of the head contract, a case of bailment on terms. The Privy Council, distinguished, *The Mahkutai* from *The Pioneer Container*, on the ground that the latter dealt the sub- bailee's ability to rely on the terms of the sub- bailment against the bailor. In contrast, *The Mahkutai* was concerned with the availability of the exclusive jurisdiction clause to the shipowner by reason of the Himalaya clause which depends on

---

[38] At first instance, Sears J., held that despite the fact that the shipowners were not parties to the bill of lading contract, they were entitled to rely on the exclusive jurisdiction clause either as a contractual term by virtue of the Himalaya clause, or as one of the terms on which the goods were bailed to them. However, the Court of Appeal accepted the cargo owner's appeal against Sears J's order and held that the shipowners were not parties to the bill of lading contract and also that there was no bailment on terms such as to include the exclusive jurisdiction clause. Both of the parties were granted leave to appeal to the Privy Council.

[39] The availability of the exclusive jurisdiction clause, to the shipowners, by virtue of the Himalaya clause see *infra* sub- title 6. 3.

[40] See *supra* fn. 37 at 6.

[41] [1985] 1 Lloyd's Rep. 291 at 295.

> the scope of the *agreement* between the head contractor and the sub-contractor, entered into by the intermediate contractor as agent for the sub- contractor, under which the benefit of a term in the *head contract* may be made available by the head contractor to the sub- contractor.[42]

The Privy Council considered the application of the principle of bailment on terms which depends on whether the shipowners could establish that they received the goods into their possession, as bailees, upon the terms set out in the bill of lading. The Privy Council held that the shipowners were not bailees on the terms of the bill of lading and one objection to the bailment on terms argument was that the exclusive jurisdiction clause was not a part of the Himalaya clause.

> it is impossible to hold that, by receiving the goods into their possession pursuant to the bill of lading, the shipowners' obligations as bailees were effectively subject to the exclusive jurisdiction clause as a term upon which they implicitly received the goods into their possession.[43]

The involvement of the master in the issue of the charterer's bill of lading should arguably have been used as an indication of the shipowners' consent to the bailment's being on the terms of the bill of lading including the exclusive jurisdiction clause, so as to come within the above *dicta* of the Privy Council in *The Mahkutai*. However, the Privy Council dismissed both the shipowners' arguments and concluded that the shipowners were not entitled to rely on the exclusive jurisdiction clause. Their appeal against the order of the Court of Appeal refusing of a stay of the cargo owner's claim in Hong Kong must therefore fail.

However, there is an argument that the decision of *The Mahkutai* will undermine the doctrine of bailment on terms,[44] since *The Pioneer Container* also contained a Himalaya clause and an exclusive jurisdiction clause, but the jurisdiction clause was accepted as a term in the sub- bailment, but not in bailment. Different results in these

---

[42] See *supra* fn. 37 at 15.
[43] *Ibid*. Surely the shipowners were bailees on the bill of lading terms which had to be read in the light of the Himalaya clause in the bill of lading?
[44] See MacMillan, C., "Elder, Dempster Sails on: Privity of Contract Bailment on Terms" [1995] LMCLQ 1 at 5.

situations should not be acceptable on the grounds of commercial convenience, referred to in *The Pioneer Container* by the Privy Council.[45] Therefore, these grounds should equally apply in *The Mahkutai*, regardless of the fact that the clause was to be found in a different contract, the head contract, rather than in the sub- contract, as in *The Pioneer Container.*[46]

Furthermore, the Privy Council's objection to the bailment on terms argument was that the exclusive jurisdiction clause was not a clause within the Himalaya clause. There is a distinction between the Himalaya clause and the bailment on terms, according to *The Pioneer Container*,[47]since the people who require the protection of the Himalaya clause are different to those who can claim the benefit of the bailment on terms. Therefore, the protection under the Himalaya clause derives from the contract, while the protection under the bailment on terms derives from the voluntary taking of the possession of the goods, by the bailee, with the acknowledgement of they belong to someone else. Moreover, contract and bailment impose different obligations and terms, which are sometimes the same, but sometimes not. The bailee's ability to claim the benefit of the terms of the bailment should derive from the fact that the bailment imposes certain duties on the bailee, and not as a result of a contractual basis. To consider whether the exclusive jurisdiction clause forms a term of the bailment, it is important to know the basis on which the shipowners were trying to establish their claim, either in contract or as a bailment on terms. The shipowners did not rely upon a contractual basis, but, rather, they based their claim upon the doctrine of bailment on terms (on the ground of the Privy Council's assumption that the shipowners were sub- contractors). Therefore, the relationship between the shipowners and the cargo

---

[45] For the reasons of commercial convenience see *The Pioneer Container*, *supra* fn. 31 and the corresponding text.
[46] See MacMillan, C., *supra* fn. 44 at 5.
[47] See *supra* fn. 10 at 603.

owners was based upon bailment, and according to decision of the House of Lords in *Elder Dempster*[48] the terms of this relation are contained in the charterer's bill of lading.[49]

The Privy Council's conclusion, in *The Mahkutai*, that the jurisdiction clause was not within the Himalaya clause and so could not be a term of the bailment, would also exclude limitation of liability and exception clauses from the terms of a bailment on terms which would undermine the House of Lords decision in *Elder Dempster*. Also, what is the situation where there is no Himalaya clause? The Privy Council identified the difficulty of determining when an *Elder Dempster* bailment on terms arose.

> in the circumstances ..... the shippers may be taken to have impliedly agreed that the goods were received by the shipowners, as bailees, subject to the exceptions and limitations contained in the known and contemplated form of bill of lading[50]

Lord Sumner, in *Elder Dempster,* has, arguably, not confined himself only with terms which were either exceptions or limitations in order to be a term on bailment, but he spoke about obligations "which *include* the exceptions and limitations of liability stipulated" Therefore, the types of which term come within the scope of bailment on terms may be larger than those that come within the scope of the Himalaya clause.[51]

Moreover, it is arguable that the shipowners in *Mahkutai* should have succeeded in their argument, as a result of the absence of any kind of conclusion by the Privy Council on the issue of whether the shipowners actually qualified as "sub- contractors" within the meaning of the Himalaya clause, cl. 4 of the bill of lading. If the shipowners were not in

---

[48] [1924] A.C. 522.

[49] See MacMillan, C., *supra* fn. 44 at 5- 6. The Privy Council, in fact, made no decision on this issue and therefore, it can be argued that, it should have done for their finding that a bailment on terms only works if the shipowner could rely on the Himalaya clause. Furthermore, the Privy Council made no decision on the shipowners' ability to rely on the bailment on terms doctrine.

[50] See *supra* fn. 37 at 9.

[51] See MacMillan, C., *supra* fn. 44 at 6- 7. This is supported by Lord Goff of Chieveley, in *The Pioneer Container*, commenting on Lord Sumner's dictum ". . . . the shipowner's obligations were effectively subject to the *terms* upon which the shipowners implicitly received the goods into their possession . . . " See *supra* fn. 10 at 600. Therefore, a jurisdiction clause can be included in the bailment on terms doctrine, since the Privy Council in *The Makhutai* excluded this term as a part of the Himalaya clause rather than from the bailment on terms doctrine.

fact 'sub- contractors' the Privy Council's decision on the terms of the bailment can no longer be justified by reference to cl. 4. The shipowners' argument is also congruous with the underlying commercial reality, as previously mentioned,[52] because both the shipowners and the charterers were Indonesian and their common understanding was that litigation would take place in Indonesia. Furthermore, as against the claimant, the inclusion of the exclusive jurisdiction clause as a term on bailment can more readily be justified as it derives from the principal contract rather than the sub- contract, as in *The Pioneer Container*.

Finally, it should be noted that the relationship between the shipowner and the shipper when a charterer's bill is issued could alternatively be viewed as a sub- bailment on terms. This view was propounded, obiter, by Lord Hobhouse in *The Starsin*, and avoids the problem of both charterer and shipowner constituting the head bailee.[53] On this analysis, the shipowner might arguably be able to rely on jurisdiction/ arbitration clause in the time charter.

6. 3. THIRD PARTY RELIANCE ON THE TERMS OF THE HEAD CONTRACT (THE 'HIMALAYA' AND 'CIRCULAR INDEMNITY' CLAUSES)

The sub- bailee can rely on the terms of the sub- bailment, in certain circumstances, as a defence to an action brought by the owner of the goods. But, can he invoke the terms of the head contract as a defence toward the principal bailor? The sub- bailee may prefer to rely on the provision of the main contract for different reasons. One is when the court cannot infer any consent by the owner of the goods to the terms of the sub- bailment. Another is when, the terms of the head contract offer wider protection to the sub- bailee than the terms of the sub- contract. This question is also critical to a third party, such as a stevedore, who

---

[52] See *supra* fn. 10 at 605.
[53] [2003] W.L.R. 711 at para. 133, ([2003] UKHL 12).

is not a bailee and cannot therefore, rely on the doctrine of sub- bailment on terms.

In *Elder, Dempster & Co .v. Paterson, Zochonis & Co*,[54] the cargo was damaged as a result of bad stowage on board the defendant's vessel. The defendant was sued in negligence by the cargo owner and the former sought to rely on the stowage exception in the bill of lading to which he was not a party, as it was a time charterer's bill of lading. The House of Lords agreed with the decision of the Court of Appeal that the shipowner could invoke the stowage exception against the claim brought by the cargo owner. In the words of Scrutton, L J., in the Court of Appeal

> the real answer to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer.[55]

The Court of Appeal allowed the shipowner to invoke the terms of the bill of lading contract on the agency doctrine and not on the bailment on terms doctrine.[56] However, the result of the above case has not been followed in subsequent cases. Therefore, in *Midland Silicones Ltd .v. Scruttons Ltd*,[57] the House of Lord applied the doctrine of privity of contract and found that the defendants were not parties to the bill of lading contract and so, they could not rely on its terms as a defence. The defendants were not bailees because they were engaged as an independent contractor to discharge the cargo without any intention that they should acquire legal possession of the goods.

The key issue is the possession of the goods, which is not, usually, transferred to the stevedores. Therefore, the position would be different where the defendants, as stevedores, were engaged to discharge the goods and also to store them until the time of

---

[54] [1924] A.C. 522.
[55] *Ibid.* at 564.
[56] The New South Wales Court of Appeal, in *Gadsden .v. Australian Commission*, [1977] N.S.W.L.R. 575, an Australian case, supported the view that the sub- bailee would not be allowed to use the terms of the contract between the principal bailor and the principal bailee.
[57] [1962] A.C. 446.

collection by the consignee. On those facts, there would be an intention that the stevedores should acquire legal possession of the goods and therefore, as sub-bailees, they would owe a duty of care towards the cargo owner. The defendant could in this case invoke only the terms of the sub- bailment in any claim brought by the cargo owner. The Privy Council in *Gilchrist Watt .v. York Products* [58] recognised the creation of a sub- bailment of the goods when the independent contractor owed the duty of taking care of the owner's goods and took legal possession of them.

The House of Lords strictly applied the rule of privity of contract doctrine in *Midland Silicones* and prevented the stevedores, engaged as independent contractors, from invoking the limitation of liability clause in the contract carriage. But Lord Reid had suggested that agency relationship might be introduced as a solution to such problems. In his view

> first, the bill of lading makes it clear that the stevedores is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier in addition to contracting for those provisions on his own behalf, is also contracting as agent for the stevedores that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.[59]

The suggestion of Lord Reid was accepted by the Privy Council in *The Eurymedon*.[60]A drilling machine had shipped under bill of lading which incorporated the Hague Rules and included an express Himalaya clause. Later, the stevedores were sued in negligence for damage caused to the drilling machine during discharging operation. Stevedores sought to invoke the Hague Rules, on the ground of the Himalaya clause, which barred any action brought more than 12 months after the damage occurred. The Privy Council concluded that the defendant was entitled to rely upon those rules, because the

---

[58] [1970] 1 W.L.R. 1262.
[59] See *supra* fn. 57 at 474.
[60] [1975] A.C. 154.

contractual carrier, in concluding the carriage contract, had been acting as agent for the stevedore.[61] Also, in *New York Star*,[62] The Privy Council confirmed the efficacy of a Himalaya clause as to confer upon the stevedores the benefit of defences and immunities contained in the bill of lading, including a one-year time bar. Lord Wilberforce stressed

> It may indeed be said that the significance of *Satterthwaite's* case lay not so much in the establishment of any new legal principle, as in the finding that in the normal situation involving the employment of stevedores by carriers, accepted principles enable and require the stevedore to enjoy the benefit of contractual provisions in the bill of lading.[63]

However, The Privy Council recognised, in the above cases, the effectiveness of the Himalaya clause, which provides protection against claims in tort by consignees. Furthermore, the Privy Council held that the clause was still capable of protecting the stevedores in respect of loss or damage that occurred outside the 'tackle to tackle' period of the carrier's responsibility under the Hague Rules.

The Privy Council held, in *The Mahkutai*,[64] according to *The Eurymedon*[65]and *The New York Star*,[66] that the shipowners could not rely on the exclusive jurisdiction clause by reason of the Himalaya clause. This is because the principle, in the latter cases, was applied to stevedores who were seeking to rely on "exemptions and limitation" and "defences and immunities" in the bill of lading. But, an exclusive jurisdiction clause is different, since it does not benefit only one party but it is "a clause which creates mutual rights and obligations".[67] The Privy Council held, as a matter of construction, that the jurisdiction clause could not fall within the wording of the particular Himalaya clause. The Privy Council also supported this conclusion by examining the purpose behind Himalaya clause

---

[61] *Ibid.* at 165. The bill of lading included an express clause which provided that any servant, agent or independent contractor employed by the carrier should be entitled to the protection of every exemption available to the carrier and that, in respect of this clause, the carrier was contracting not only on his behalf but also as agent or trustee on behalf of the parties named.
[62] [1981] 1 W.L.R. 138.
[63] *Ibid.* at 143.
[64] [1996] 3 W.L.R. 1.
[65] See *supra* fn. 60.
[66] See *supra* fn. 62.
[67] See *supra* fn. 37 at 13.

which would prevent the cargo owner from suing those person who had performance the service in order to avoid the contractual defences available to the carrier. Reliance on an exclusive jurisdiction clause did not further this purpose. Additionally, the benefit of an exclusive jurisdiction clause would not extend to sub- contractors, because such sub-contractors are frequently present in countries other than the carriers' countries. Therefore, The Privy Council concluded that, the benefit of the exclusive jurisdiction clause, in the present case, would only occur, by coincidence, where the shipowners as sub- contractors and the carriers were present in the same jurisdiction.[68] Therefore, the protection of such clauses can be extended to third parties only by means of a 'Himalaya' clause, redrafted so as to avoid the linguistic problems highlighted in *The Mahkutai*. Re- drafting the Himalaya clause might arguably extend the benefit of an exclusive jurisdiction clause to such third parties as to provide a clear reference in the Himalaya clause that the exclusive jurisdiction clause should also be available to such third parties as well as to the contracting party.[69] But, the question of whether such an extension of the exclusive jurisdiction clause would be acceptable before the court might be doubtful on the basis of the Privy's Council decision in *The Makhutai*.

Recently, the Court of Appeal in *The Starsin*[70] has considered the meaning of sub-contractor 'independent contractor' in the Himalaya clause. Rix L.J., agreed with Colman J., at the first instance, who defined 'independent contractor' as "a third party with whom a party to the contract enters into a contract under which the third party contracts to perform some or all of the obligations which that party had undertaken to perform under the head contract, in other words, a sub- contractor".[71] Therefore, the shipowners of a

---

[68] See *supra* fn. 37 at 12- 14.
[69] For support for this view see Gaskell, N., *Bills of Lading: Law and Contracts*, (*et al*), 1st. Edition, LPP 2000, at para. 12. 31 and para. 12. 38 and *Carver on Bills of Lading*, 1st. Edition, London: Sweet & Maxwell 2001, at para. 7- 078.
[70] [2001] 1 Lloyd's Rep. 437 at para. 113, ([2001] EWCA Civ 56).
[71] *Ibid*. at para. 112.

chartered vessel would be considered as independent contractors within the Himalaya clause. Then Rix L.J., added that "Unlike the members of the Court of Appeal of Hong Kong, [in *The Mahkutai*] I do not find the wider construction artificial. . . Once it had been decided that they were charterer's bills and that the shippers had contracted with the charterers as carriers it was (and is) open to the Court to treat shipowners as sub-contractors for the carriage of the cargo and independent contractors on behalf of the charterers".[72] This finding was upheld by the House of Lords.[73]

The period of responsibility under the Hague and the Hague- Visby Rules, by virtue of arts. I (e) and II, is between loading and discharge 'tackle to tackle'. Therefore, the Himalaya clause would not provide any protection to the carrier's sub- contractors in relation to operations outside the 'tackle to tackle' period. It seems. therefore, the Himalaya clause should contain a term extending the period of responsibility so as to include periods before loading and after discharge. Such term would provide the carrier' sub- contractors with the necessary protection against any liability which occurred outside the 'tackle to tackle' period under the Hague and Hague- Visby rules.

This constitutes a vital restraining element on the use of the 'Himalaya' clause, for the contract it creates is parasitic on the carriage contract itself. The consequence of this can be seen in two cases. First, in *Raymond Burke Motors Ltd. v. The Mersey Docks and Harbour Co.*,[74] where a consignment of motor cycles was taken to the defendants' terminal facility. While the consignment was in the container park, it was damaged by the chemical escaped following an incident occurring during the discharge of cargo from another vessel. The defendants sought to rely on the terms of the bill of lading, which would have been issued had the consignment been loaded, the bill containing a 'Himalaya' clause. Leggatt J., held that they could not rely on the bill's terms as the damage was occurred before

---

[72] *Ibid.*
[73] See *supra* fn. 53.
[74] [1986] 1 Lloyd's Rep. 155.

loading began and therefore before the carrier's period of responsibility began under the 'tackle to tackle' rule. The finding would be the same even though the carrier had acted as the shipper's freight forwarder. This is because the damage occurred while the carrier was acting as a freight forwarder rather than as a carrier. This problem can be avoided by expanding the carrier's period of responsibility from 'tackle to tackle' to 'port to port'. However, in the absence of such an expansion, the Himalaya clause will not protect the terminal operator if the cargo is damaged between its being received into its custody and the start of loading. Nonetheless, the terminal operator can avoid this problem by issuing a receipt to the shipper incorporating the terms on which it wishes to rely. This will constitute a bailment or sub- bailment on terms, or, possibly, a separate contract, as found by the Court of Appeal in *The Rigoletto*.[75] By issuing a receipt, the terminal operator would be protected by the Himalaya clause on the terms of its own receipt rather than on the terms of the bill containing the 'Himalaya' clause. Although Lord Goff of Chieveley in *The Pioneer Container* contemplated that a sub- carrier might be entitled to elect to rely on either the terms of the 'Himalaya' clause in the head bailment or its own terms in the sub-bailment, the right of election does not apply where the shipper deals directly with a sub-contractor, such as the terminal operator. Therefore, the Court of Appeal in *The Rigoletto*[76] held that the defendant, by issuing its own receipt, had elected to rely on its own terms rather than those contained in the bill of lading containing the 'Himalaya' clause.

Secondly, the 'Himalaya' clause in *The Starsin* went further than extending the exceptions and limitations of the Hague Rules to the sub- contractor and purported to grant the sub- contractor a complete exemption from liability. As a result of the House of Lords' finding that the bills were charterers' bills, it became necessary to decide whether the

---

[75] [2000] 2 Lloyd's Rep. 532.
[76] *Ibid*. at para. 49.

shipowners were liable in negligence[77] and, if so, whether they could take the benefit of this complete exemption. Their Lordships held that the 'Himalaya' clause should be construed in accordance with the other terms of the bill, in particular the one which gave a paramount importance to the Hague Rules. This entailed an examination of whether the complete exemption clause was nullified by art. III (8). This required consideration of whether 'the carrier' referred to in that clause included a party who performed the actual carriage of goods. Their Lordships, by a 4- 1 majority, found that it did and therefore, the shipowners could not rely on the complete exemption in favour of sub- contractors. Had the sub- contractor been a terminal operator, such finding may will have been different as such a party would not have been involved in the actual carriage of goods. Such distinction of treatment would be difficult to justify in the light of the services which are covered by the Hague Rules as to include loading, stowing and discharge as well as the carriage itself. Therefore, a party who loads or stows the cargo is as much a 'carrier' under art. III (8) as one who actually carries the goods in that both parties are performing the incidents of a 'contract of carriage' as defined by the Rules and neither has actually contracted to perform those services.

The 'Direct Approach'

The Supreme Court of Canada, in *London Drugs Ltd .v. Kuehne & Nagel*,[78] have adopted a new method to meet the problem of the doctrine of privity of contract. The plaintiff sued the employees of warehouseman in negligence for damaging a transformer, and the latter tried to rely on the limitation of liability clause contained in the contract between the plaintiff and the warehouseman. The court sought to create a new exception to the privity rule and to allow the employees to invoke the limitation clause. The justification of the new exception was outlined by Iacobucci, J.,

---

[77] The House of Lords found that the shipowners were liable in negligence in respect of one the claimants.
[78] [1992] 97 D.L.R. 261. (4th).

> When an employer and a customer inter a contract for services and include a clause limiting the liability of the employer for damages arising from what will normally be conduct contemplated by contracting parties to be performed by the employer's employees, and in fact so performed, there is simply no valid reason for denying the benefit of the clause to employees who perform the contractual obligations.[79]

The operation of this exception depends on two requirements, one of them, the expressed or implied intention of the parties to extend the benefits of these clauses to the employees seeking to rely on it. On the other hand, the damages must occur during the performance of the service contained in the contract and the employees must also have been acting in the course of their employment. In the above case the court had relied on the implied intention and concluded from the circumstances of the case and the absence of clear indication in the contract to the contrary, the term "warehouseman" must be interpreted as warehousemen.[80] However, it is arguable that, the exception in the above case is to protect the employees which can be justified as a method of giving effect to the true intention of the parties which may be implied or express. Meanwhile, this exception would not be useful to independent contractors or sub- contractors, unless the principal contractor is contracting as an agent as well as a principal, as with the Himalaya clause.

The Circular Indemnity Clause

The circular indemnity clause is another method for providing the carrier's sub- contractor with the necessary protection against a claim by the cargo owner. The clause amounts to an undertaking by the bill of lading holder that it will not sue the carrier's sub- contractors and that it will indemnify the carrier in the event that it breaches the undertaking. A cargo owner suing the carrier's sub- contractor would constitute a breach of such a clause and would allow the carrier to sue the cargo owner directly for such breach. The carrier may apply for a stay of the cargo owner's action against his sub- contractor, provided the carrier can show that the cargo owner's breach of the circular indemnity clause prejudiced its

---

[79] *Ibid.* at 361.
[80] *Ibid.* at 369.

interest, as in *Nippon Yusen Kaisha .v. International Import and Export Co. Ltd., (The Elbe Maru).*[81] However, the carrier can invoke such a clause after the cargo owner's claim has been made against the carrier's sub- contractor by way of express indemnity. The disadvantage with the circular indemnity clause is that the third party's protection is depending upon the carrier activating its right under the clause. Even if the carrier applies to stay the proceedings brought against the third part, there is no guarantee that the court will actually order a stay.

6. 4. THE PROBLEM OF PARALLEL ACTIONS IN NEGLIGENCE AND BAILMENT

The utility of the doctrine of sub- bailment on terms at confining claims within the ambit of the Hague and Hague- Visby Rules depends on the claim being made in bailment. What if the claimant elects to base its claim exclusively on the general duty of care in negligence? Donaldson J., in *Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd.*,[82] considered the problem of parallel actions in negligence and bailment and stated that "If Constantine Terminals had themselves damaged the cargo, quite different considerations would have been involved. The plaintiffs could have set out to prove negligent conduct without any reference to bailment. Whether, in those circumstances, Constantine Terminals could have relied on the contract of sub- bailment to which the plaintiffs were strangers or on the contract of head bailment to which they were strangers, seems to me to be a problem of some nicety to be tackled only when it arises".[83]

---

[81] [1978] 1 Lloyd's Rep. 606. The Court might refuse to grant such a stay as in *The Chevalier Roze*, [1983] 2 Lloyd's Rep. 438, where the carrier failed to show such prejudice to its interest.
[82] [1976] 2 Lloyd's Rep. 215 at 220.
[83] Similar *dicta* to Donaldson's J., was expressed by Bingham L.J., in *The Captain Gregos (No 2)*, [1990] 2 Lloyd's Rep. 395 at 406, and by Staughton L.J., in *The Gudermes*, [1993] 1 Lloyd's Rep. 311 at 328.

Lord Steyn, in *The Nicholas H*,[84] held that a classification society owned no duty of care towards the cargo owners where their goods were carried on board a vessel which it had surveyed and stated that "The law of torts applies generally and it is not simply supplementary to the law of contract. A remedy in tort is not confined to situations where no remedy in contract is available". Then, he proceeded to state that "The liability in tort was independent of any liability in contract . . .. In two situations, however, liability in tort depends on contract. First, where a plaintiff consents to the terms in the defendant's contract with a third party on the basis of which the defendant undertakes the task in question or the plaintiff authorise the third party to agree with the defendant that the defendant's undertaking of that task should be subject to those terms. The defendant may rely on the terms of the contract when sued by the plaintiff in tort. Secondly, the terms of the plaintiff's contract with a third party may contemplate that the defendant will undertake a task and the plaintiff will not hold the defendant liable for the consequences of any negligence".[85]

According to these *dicta*, it seems that it is open to the claimants to sue third parties in tort rather than in bailment so as to avoid the doctrine of sub- bailment on terms. However, in *The Nicholas H*, by a 3- 2 majority, the House of Lords found that policy grounds dictated that no duty of care should be imposed on the classification society, even though the case involved negligence occasioning physical loss which would appear to fall clearly within the general duty of care in *Donoghue .v. Stevenson*.[86] There were two grounds to justify this departure from the general rules. First, the public nature of classification societies. Secondly, the fact that the imposition of a duty of care would undermine the uniformity of international conventions on liability, such as the Hague Rules, and on limitation of liability. The second, but not the first, reason would apply with

---

[84] [1996] A.C. 211 at 214.
[85] *Ibid*. at 215.
[86] [1932] A.C. 562.

equal cogency to an attempt to avoid the doctrine of sub- bailment on terms by pleading the claim exclusively in general negligence.[87]

Lord Hobhouse in *The Starsin*[88] held that "The sub- bailment creates a specific bailor/ bailee relationship between the sub- bailee and the goods owner. It is not the same as the 'neighbour/ foresight' relationship exemplified by *Donoghue .v. Stevenson* and the duties created are not the same". The Court of Appeal in *East West Corporation .v. Dkbs 1921* held that it was unnecessary to consider whether or not the shipowner could have been found liable in negligence had there been no parallel liability in bailment.[89] Mance LJ., observed "In these circumstance, it is unnecessary to examine the authorities and arguments deployed for and against the proposition that, if the appellants had no other potential responsibility towards the respondents, they must at least be regarded as owing the respondents an ordinary duty of care. *The Aliakmon* rejected such a proposition in a case where the buyer at risk was attempting to hold the carriers responsible in negligence, without having any proprietary or possessory basis for so doing. The House of Lords was unable to understand how any purely tortious duty of care could be treated as modified so to equate with the intricate blend of responsibilities and liabilities constituted by the Hague Rules, which governed the shipowners' bill of lading liability (p. 818). Similar consideration would have presented a formidable impediment to the recognition of any purely tortious duty, if I had not concluded that the appellants owed duties towards the respondents in or paralleling those owed in bailment, notwithstanding the delivery to Chilean banks of bills of lading. On the basis, well- recognised duties exist in law and the doctrine of bailment on terms is potentially available as a controlling mechanism. So it is

---

[87] Similar reasoning lies behind the decision in *Norwich City Council .v. Harvey*, [1989] 1 W.L.R. 828.
[88] See *supra* fn. 53 at para. 136.
[89] See *supra* fn. 3 at para. 50.

unnecessary for me to consider further whether the impediment would have been insuperable, it simply does not arise".[90]

6. 5. CONTRACTS (RIGHTS OF THIRD PARTIES) 1999 ACT

The terms of Contracts (Rights of Third Parties) 1999 Act are not applicable to carriage contracts by sea, by virtue of s. 6 (5- 7). However, third parties, such as stevedores, fall within the exception contained in s. 6 (5) (b) which provides except that "a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract". Stevedores' protection would depend on their falling within the class of persons, by virtue of s. 1 (3) which refers to a party being "expressly identified in the contract by name, as a member of a class or as answering a particular description but need not to be in existence when the contract is entered into".[91] Therefore, the efficacy of Himalaya clauses has finally been recognised by legislative reform which provides a simpler and more certain mechanism for reaching the same result reached in *The Eurymedon* and other similar cases. An arbitration clause is also available to such a third party by virtue of s. 8 of the 1999 Act. In contrast, jurisdiction and choice of law clauses are not available to such a third party and so the 1999 Act has followed the decision of the Privy Council in *The Mahkutai*. For this reason, the 'Himalaya' clause may still be attractive. With suitable re-drafting, it may be possible to use such a clause to extend the benefit of jurisdiction and choice of law clauses to sub- contractors; a possibility not open under the 1999 Act.

---

[90] *Ibid.*

[91] This would cover a clause in favour of any sub- contractor, including a shipowner when a charterer's bill is issued.

6. 6. NON- CONTRACTUAL CLAIMS UNDER US LAW

6. 6. 1. STEVEDORES', TERMINAL OPERATORS' AND INLAND CARRIERS' LIABILITIES TO CARGO OWNER

"[M]ulimodal transportation has created complex, overlapping legal relationships. The precise scope of these parties' obligations often depends not only on the provisions of the contract of carriage, but also on the terms of the subordinate contractual arrangements for performance of the various phases of the through transportation and handling".[92] Because the services performed by stevedores and terminal operators are frequently performed between the ship and the shore, there is no consistent national approach as whether these services are maritime or non- maritime services, in particular when the relationships between these persons and shippers and consignees, are in dispute. Considering these services as non- maritime services would allow courts to apply state laws rather than federal law which would affect the uniformity of federal maritime law.[93]

Accordingly, stevedores may be liable directly to shippers and consignees for negligence[94] or in bailment under state law. It was held in *Philipp Bros. Metal Corp. v. S.S. Rio Iguazu*,[95] that Pittston, the stevedore, became a common- law bailee after delivery to Philipp Brothers had been completed at the time Philipp Brothers caused the cargo to be

---

[92] Denniston, Thomas R., and Others "Admiralty Law Institute Symposium: Terminal Operators and Multimodal: Liabilities of Multimodal Operators and Parties Other than Carriers and Shippers" (1989) 64 Tul. L. Rev. 517 at 519 and, also, see Palmer, Richard W., Admiralty Law Institute Symposium: Terminal Operations and Multimodalism: Terminal Operations and Multimodal Carriage: History and Prognosis" (1989) 64 Tul. L. Rev. 281.

[93] See, in general, Lambert, L., "Admiralty Law Institute Symposium: Damages in Maritime cases: Article: Damages Arising from Breach of Contract, Loss of Revenue, and 'Indirect' damages" (1997) 72 Tul. L. Rev. 759; Schoenbaum, Thomas J., *Admiralty and Maritime Law*, 3d Edition, West Group: St. Paul, Minn., 2001, 8- 8 at pp. 527- 530, Tetley, W., *Marine Cargo Claim*, 4th Edition, chapter 36, The full text of this edition is available on the net; http://tetley.mcgill.ca/maritime/ch36.htm and Dock, James B., "Admiralty Law Institute: Symposium on Carriage of Goods by Water: Liabilities of Stevedores, Terminal Operators, and Other Handlers in Relation to Cargo" (1971) 45 Tul. L. Rev. 572.

[94] Stevedores are liable for the loss or the damage to the cargo caused by their negligence. See *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 79 S. CT. 766 at 773, 1959 AMC 879; *Demsey & Associatees, Inc. v. S.S. Sea Star*, 461 F. 2d 1009, 1016, 1972 AMC 1440 (2d Cir. 1972) and *Leather's Best, Inc., v. S.S. Mormaclynx*, 451 F. 2d 800 at 808, 1971 AMC 2383 (2d Cir. 1971).

[95] 658 F. 2d 30 at 32, 1981 AMC 2864 (2D Cir. 1981).

counted and weighed. Leaving the goods, after delivery to Philipp Brothers, created a new bailor- bailee relationship between Philipp Brothers and Pittston. As a bailee, Pittston, was acting neither on the carrier's behalf to fulfill its obligations under carriage contract, since those obligations had been discharged after delivery to Philipp Brothers, nor at the carrier's direction. Philipp Brothers' acts, rather than the carrier's, were what created the bailment relationship. Therefore, the court held that "Since Pittston's [a stevedore's] liability is premised on its position as a bailee, any time limit or limitation of liability contained in the bill of lading or COGSA are inapplicable". Thus, damages in full may be assessed without regard to any limit of liability contained in the bill of lading or under COGSA.[96]

COGSA's application, by virtue of s. 1301 (e) is limited to "the period from the time when the goods are loaded on to the time when they are discharged from the ship", commonly known as the "tackle to tackle" period. Services provided by stevedores and terminal operators are normally performed outside the "tackle to tackle" period. Accordingly, the Harter Act governs the responsibility of stevedores and terminal operators. The Harter Act, by virtue of s. 190, applies to any period before loading and to any period between discharge of the cargo from the ship and its proper delivery. COGSA, by virtue of s. 1311, while partially superseding the Harter Act, expressly preserves its application outside the "tackle to tackle" period. Nonetheless, COGSA, by virtue of s. 1307, allows the parties to the carriage contract to enter in a special agreement relating to the period "prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea". Therefore, the parties to the carriage contract can elect to extend the application of COGSA during this period. However, any special agreement between the parties is governed by the Harter Act, which makes void any provision in the bill relieving the carrier from the responsibilities set forth in the Act.

---

[96] *Ibid.*

Terminal operators are generally independent contractors to the carrier and have the status of bailees under state laws of bailment. Therefore, as bailees, they are liable for negligence or the lack of due care that results in the loss of or the damage to the cargo. In *Colgate Palmolive Co. v. S.S. Dart Canada*,[97] the plaintiff delivered a total of 22 drums of spearmint oil to the defendant terminal operator (Global) in Jersey City, New Jersey. The defendant (Global) contracted with a third party (Dart) to store the goods until it loaded them on board the vessel. Sixteen of the drums were never loaded on board and were never located. Global issued a dock receipt covering all the goods and which incorporated all the terms of the bill of lading issued by the third party (Dart). One of the issues before the court was whether the defendant (Global) could rely on the package limitation of COGSA. The court held that "Parties may contractually extend COGSA's application beyond its normal parameters. When they do so, however, COGSA does not apply of its own force, but merely as a contractual term. In this case, state law, the law of New Jersey, governs and invalidates the contractual limitation of liability upon which Global relies".[98] The court relied on its decision in *Leather's Best, Inc., v. S.S. Mormaclynx*,[99] and held that " an action against a terminal for negligent loss of cargo is not within federal maritime jurisdiction, but is a state claim governed by state law. Since state law governs, provisions of COGSA incorporated by contract can be valid only insofar as they do not conflict with applicable state law".[100]

The Court of Appeal for the Fourth Circuit in *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*,[101] have not followed the Second Circuit's decision in *Colgate Palmolive Co. v. S.S. Dart Canada*. It held that "[T]he contractual incorporation of COGSA into

---

[97] 724 F. 2d 313 at 314 (2d Cir. 1983).
[98] *Ibid.* at 315. The court disagreed with the District Court's decision that the state law is totally unavailing.
[99] See *supra* fn. 94 at 808.
[100] See *supra* fn. 97 at 315- 316.
[101] 5 F. 3d 734, 1993 AMC 2842 (4th Cir. 1993).

foreign bills of lading should be construed according to federal law".[102] It then added that "So long as the bill of lading is still governed by COGSA or the Harter Act, which includes the period of time after discharge of the goods but prior to delivery, the rights and obligations of third party beneficiaries under a Himalaya clause should be determined with reference to the bill of lading, not state law, even if state law is inconsistent".[103] Most courts apparently have assumed, without deciding the point, that contractual extensions of COGSA are to be construed according to the terms of the bill of lading and without reference to state law. The Court of Appeal for the First Circuit in *Barretto Peat, Inc. v. Luis Ayala Colon Successors Inc.*,[104] held that the defendant stevedores were acting within the scope of the carrier's contractual functions and duties and were entitled to the benefit provided by the Himalaya clause, including the COGSA one- year statute of limitations. Moreover, it stated that "In conclusion, given the applicability of COGSA, [the plaintiff] cannot circumvent COGSA's operation by couching its complaint in terms of conversion or breach of contract".[105] The Court of Appeal for the Fifth Circuit in *Gebr. Bellmer KG. v. Terminal Services Houston, Inc.*,[106] allowed the stevedores to claim the package limitation of COGSA under the Himalaya clause according to the terms of the bill of lading and without reference to state law. The damage to goods here occurred outside the "tackle to tackle" period. The shipper's cargo consisted of four containers, which were loaded upon a tractor and chassis. The stevedore's employee was driving the load of four containers to a particular staging area designated by the shipper's agent where the cargo would cease to be in the carrier's possession. While en route the cargo fell off the trailer and was damaged beyond repair. The Court of Appeals for the Eleventh Circuit in *Assicurazioni Generali v.*

---

[102] *Ibid.* at 740.
[103] *Ibid.*
[104] 896 F. 2d 656 at 660 (1st Cir. 1990).
[105] *Ibid.* at 661.
[106] 711 F. 2d 622 at 624- 625, 1986 AMC 607 (5th Cir. 1986).

D' Amico,[107] in a suit brought by an insurer against the carrier and its agent, a stevedore, for negligent damage to cargo held, without even considering state law, that it was well settled that parties to a bill of lading may contractually extend limitation of liability benefits to non- carriers and agents of the carrier and that the parties had, in fact, successfully done so.

Therefore, carriers have attempted to circumvent this problem by extending the application of COGSA 1936 to these parties, in particular the package and the one- year limitations and the list of defences provided by the provisions of COGSA, through their bills of lading by the inclusion of three types of clauses: Himalaya clause, a period of responsibility clause and a clause paramount.

The requirements for a valid Himalaya clause has been established by the Supreme Court in *Robert C. Herd & Co. v. Krawill Machinery Corp.*,[108] as follows, "There is, thus, nothing in the language, the legislative history or environment of the Act that expressly or impliedly indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence". However, the Supreme Court held that stevedore was liable on the ground that "No statute has limited its liability, and it was not a party to nor a beneficiary of the contract of carriage between the shipper and the carrier, hence its liability was not limited by that contract".[109] Therefore, stevedores or other third parties can avail themselves of the benefit of the provisions of COGSA if the language of the Himalaya clause expresses clearly that is to be the understanding of the contracting parties and so the Supreme Court held that

---

[107] 766 F. 2d 485 at 490, 1986 AMC 1051 (11th Cir. 1985).
[108] See *supra* fn. 94 at 301- 302.
[109] *Ibid.* at 308.

"Similarly contracts purporting to grant immunity from, or limitation of liability must be strictly construed and limited to indented beneficiaries".[110]

The language requirement does not, however, mean that the beneficiary parties should be enumerated in the Himalaya clause contained in the bill of lading. Thus, it was held in *Certain Underwriters at Lloyds v. Barber Blue Sea Line*,[111] that "It is sufficient that the terms express a clear intent to extend benefits to a well- defined class of readily identifiable persons". Moreover, the court emphasised in *Institute of London Underwriters v. Sea- Land Service, Inc.*,[112] that the use of a more inclusive term [independent contractor] evidenced the parties' intention to extend the coverage of COGSA to stevedores through the Himalaya clause and held that "If it were the case that the several types of agents and independent contractors listed in the parenthetical phrase were to be *excluded* from the extension of COGSA coverage, the Himalaya Clause would be rendered extraordinarily empty, as it would exclude from coverage all 'agents' and 'independent contractors'". However, the courts are divided on the adequacy of a general phrase, such as 'all persons rendering services in connection with the performance of this contract'. The Court of Appeals for the second Circuit in *Ruppy v. Int'l Terminal Operating Co.*,[113] concluded that the phrase "all persons rendering services in connection with contract" in the Himalaya Clause was overbroad and ineffective to cover the terminal operator.[114] Nonetheless, The Court of Appeal for the Fourth Circuit in *Wemhoener Pressen v. Ceres Marine Terminals,*

---

[110] *Ibid.* at 305. See *Jagenberg, Inc. v. Georgia Ports Authority*, 882 F. Supp. 1065, 1995 AMC 2333 (S.D.Ga. 1995), where the court held that the Himalaya clause was too ambiguous to be given effect.
[111] 675 F. 2d 266 at 270 (11th Cir. 1982). See, also, *Taisho Marine and Fire Ins., Co. v. The Vessel Gladiolus*, 762 F. 2d 1364, 1987 AMC 2047 (9th Cir. 1985); *Ram Metals & Building Industries, Ltd. v. Zim Israel Nav. Co., Lltd.*, 732 F. Supp. 106, 1989 AMC 2215 (S.D.Fla. 1989) and *Watkins .v. M/V London Senator*, 112 F. Supp. 2d 511 at 517, 2000 AMC 2740 (E.D. Va. 2000).
[112] 881 F. 2d 761 at 767, 1989 AMC 2516 (9th Cir. 1989) and see, also, *Acciai Speciali Terni USA, Inc. v. M/V Berane*, 181 F. Supp. 2d 458 at 464, 2002 AMC 528 (D. Md. 2002).
[113] 479 F. 2d 674 at 676 (2d Cir. 1973).
[114] See also *James N. Kirby v. Norfolk Southern Railway*, 300 F. 3d 1300 at 1308, 2002 AMC 2113 (11th Cir. 2002). In general see Zawitoski, "Limitation of Liability for Stevedores and terminal Operators Under the Carrier's Bill of Lading and COGSA" [1986] 16 J. Mar. L. & Com. 337 at 345.

Inc.,[115] have upheld such general phrases. The courts are also divided on the adequacy of the term 'bailee'. The Court of Appeals for the Eleventh Circuit in *Assicurazioni Generali v. D' Amico*,[116] held that such term was sufficiently clear to protect stevedores and terminal operators. Other courts held that identical terms was insufficient to protect stevedores and inland carrier.[117]

American courts are divided on the issue of whether or not a Himalaya clause would only protect a third party who is in privity with the mean contractor, such as the ocean carrier. On the one hand, the Court of Appeals for the Eleventh Circuit in *Certain Underwriters at Lloyds v. Barber Blue Sea Line*,[118] held that "when a bill refers to a class of persons such as agents and independent contractors, it is clear that the contract includes all those persons engaged by the carrier to perform the functions and duties of the carrier with the scope the carriage contract. No further degree of clarity is necessary".[119] The Court of Appeals for the Ninth Circuit in *Taisho Marine & Fire Ins., Co. v. The Vessel "GLADIOLUS"*,[120] endorsed such dicta and held that whether an entity is the intended beneficiary of a Himalaya clause is determined by the contractual relationship between such entity and the carrier, and the nature of the services performed by such entity compared with the carrier's responsibilities under the carriage contract.[121] The Court of

---

[115] See *supra* fn. 101 at 742- 743. See also *Thiti Lert Watana Co. v. Minagrates Corp.*, 105 F. Supp. 2d 1077 at 1080, 2001 AMC 80 (N.D. Cal. 2000).
[116] See *supra* fn. 107 at 489- 490.
[117] See *De Laval Turbine, Inc. v. West India Indus.*, 502 F. 2d 259 at 264- 270, 1974 AMC 1156, (3rd. Cir. 1974).
[118] See *supra* fn. 111 at 270. See, also, *Assicurazioni Generali v. D' Amico, supra* fn. 107 at 487- 488 and *Ram Metals & Building Industries, Ltd. v. Zim Israel Nav. Co., Lltd., supra* fn. 111.
[119] The Court of Appeals for the Eleventh Circuit endorsed the privity requirement dicta latter in *Hale Container Line, Inc. v. Houston Sea Packing Co.*, 137 F. 3d 1455 at 1466 (11th Cir. 1998) and held that "Houston [the defendant] was neither an agent nor independent contractor of Project Logistics [the plaintiff]. ..... Houston not directly employed by Project Logistics, did not receive payment for its services from Project Logistics, had no contractual relationship with Project Logistics, and was not rendered an agent by Project Logistics as Project Logistics did not consent to have Houston act on its behalf".
[120] See *supra* fn. 111 at 1367- 1368.
[121] The Court of Appeals for the Ninth Circuit endorsed the privity requirement dicta latter in *Mori Seiki USA, Inc. v. M/V Alligator Triumph*, 990 F. 2d 444 at 450- 451 (9th Cir. 1993).

Appeal for the Second Circuit in *Toyomenka, Inc. v. S.S. Tosaharu Maru*,[122] held that the Himalaya clause was not applicable to an independent contractor since he was engaged by the stevedore rather than the ocean carrier.

On the other hand, the Court of Appeals for the Eleventh Circuit in *James N. Kirby v. Norfolk Southern Railway*,[123] held that where the term is descriptive, such as "stevedore", "terminal operator", unlike the non- descriptive term as in *Certain Underwriters* "agent", "servant" or "independent contractor", privity of contract is not required. The Court of Appeals for the Ninth Circuit in *Akiyama Corp. of America v. M. V. Hanjin Marseilles*[124] disregarded the privity requirement and instead focused on comparing between "the nature of the services performed [by the defendant who seeks to invoke the cause] compared to the carrier's responsibility under the carriage contract". However, the Court of Appeals for the Eleventh Circuit in *James N. Kirby v. Norfolk Southern Railway*,[125] held that "Indeed, the result, though not the language, of *Akiyama* conforms this rule [where the term is descriptive, such as "stevedore", "terminal operator", the requirement of privity of contract is not required]". Nonetheless, it is well settled that a Himalaya clause is valid if COGSA is incorporated either by a clause paramount or by reference into a bill of lading,[126] and the benefits of such a clause is extended to stevedores, terminal operators, and other agents and independent contractors of the carrier.[127]

In respect of the period of responsibility clause, the bill of lading should contain a clause that extends the application of COGSA to periods prior to loading and subsequent to

---

[122] 523 F. 2d 518, 1975 AMC 1820 (2d Cir. 1975).
[123] See *supra* fn. 114 at 1309 fn. 11.
[124] 162 F. 3d 571 at 574 (9th Cir. 1998). In earlier decision the Court of Appeals for the Ninth Circuit in *Mori Seiki USA, Inc. v. M/V Alligator Triumph*, *supra* fn. 121 at 450- 451, endorsed the privity requirement dicta which implicitly contradicts *Akiyama* dicta.
[125] See *supra* fn. 114 at 1309 fn. 11.
[126] In *Hiram Walker & Sons v. Kirk Line*, 30 F. 3d 1370, 1995 AMC 879 (11th Cir. 1994), the terminal operator/ stevedore was given the benefit of a Himalaya clause despite inadvertently issuing a premature delivery receipt.
[127] See *Brown & Root, Inc. v. M/V* Peisander, 648 F. 2d 415, 1982 AMC 929 (5th Cir. 1981); *Assicurazioni Generali v. D' Amico*, *supra* fn. 107; *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, *supra* fn. 101.

discharge of the cargo from the vessel. This is because such period is limited to "tackle to tackle" under COGSA and, therefore, the absence of such a clause will prevent the carrier and third parties from claiming the benefits of COGSA's provisions outside the "tackle to tackle". The effect of the period of responsibility clause is to apply COGSA's benefits as terms of the contract rather than as matters of law. Thus, the Harter Act's provisions, which generally cover the periods prior to loading and subsequent to discharge, will prevail over such a clause that exculpates the carrier or third parties from liability for negligence. This is because the application the Harter Act's provisions outside the "tackle to tackle" period will be as a matter of law rather than as contractual terms.

As regard the paramount clause, a clause paramount is a clause that designates COGSA as the controlling law with respect of the rights and liabilities of all the parties to the carriage contract, such as the bill of lading. Such a clause is mandatory in foreign trade, because s. 13 of COGSA requires the clause paramount to be included in the bill of lading.

THROUGH BILL OF LADING[128]

A through bill of lading is "one by which an ocean carrier agrees to transport goods to their final destination".[129] The question of whether a particular bill of lading is a through bill of lading is a question of fact and so, in *Marine Office of America Corp. v. NYK Lines*,[130] it was held that "Whether a particular contract is indeed a through bill of lading is a question of fact, to be determined by examining various factors such as the final destination indicated on the document, the conduct of the shipper and carriers, and where the connecting carriers were compensated by the payment made to the initial carrier or by

---

[128] The use of "Through Bill of Lading" phrase, here, means that this bill covers a mulltimodal transportation; combined transport bill of lading. While, if the on- carriage involves another vessel or vessels, the bill covers a through transport, through bill of lading. See Schoenbaum, Thomas J., *Admiralty and Maritime Law*, *supra* fn. 93 at pp. 522.

[129] Donovan, Charles S., & Haley, Jill M., "Who Done It and Who's Gonna Pay?- Rights of Shippers and Consignees Against Non- Ocean Carriers Performing Part of a Contract of Carriage" (1998) 7 D.C.L. J. Int'l & Prac. 415 at 415.

[130] 638 F. Supp. 393 at 399, 1987 AMC 652 (N.D.Ill 1985). These factors were cited in *Tokio Marine & Fire Ins. Co., ltd. v. Hyundai Merchant Marine Co., Ltd.*, 717 F. Supp. 1307 at 1309, 1989 AMC 2672 (N.D.Ill 1989).

separate consideration". Other factors were found in *Toshiba Int'l Corp. v. M/V Sea- Land Express*,[131] such as the issuance of a domestic bills of lading by the connecting carrier and identifying which party had made the transportation arrangement with the connecting carriers. Under such a bill someone other than the ocean carrier performs a portion of the contracted carriage such as land or rail carrier. The cargo owner may proceed directly against the non- ocean carrier for loss of or damage to the cargo. However, inland carriers have frequently sought to take the benefits afforded by COGSA and, therefore, ocean carriers have tried to include into their bills several clauses- Himalaya, Period of responsibility, and Paramount clauses- which would affect the inland carrier's liability to the cargo owner.

However, the effectiveness of the inclusion of such clauses- Himalaya, Period of Responsibility, and Paramount clauses- into through bills of lading as so to allow inland carriers to take the benefits afforded by COGSA is not without risks, if such bills are ill-drafted. The issue before the Court of Appeals for the Fifth Circuit in *Mannesman Demag Corp. v. M/V Concert Express*[132] was whether the Harter Act was compulsorily applicable to the inland portion of carriage pursuant to a through bill of lading.[133] The court held that the carrier's duty of care under COGSA would be limited to the period from the time the goods are loaded on board the vessel until the time when they released from the vessel's tackle at the discharge port. Nonetheless, the Harter Act would be applicable to any period after the discharge of the goods from the vessel and their proper delivery.[134]

---

[131] 481 F. Supp. 123 at 129 (S.D.N.Y 1994).

[132] 225 F. 2d 587, 2000 AMC 2935 (5th Cir. 2000). See, in general, Parker, Bradley S., "Mannesman Demag Corp. v. M/V Concert Express: A Denial of Maritime Protections to Overland Transportation Companies" (2001) 25 Mar. Law. 547.

[133] Clause 3 (1) of the ocean carrier's through bill of lading provides that "If and to the extent that the provisions of the Harter Act ..... would otherwise be compulsorily applicable to regulate the Carrier's responsibility for the goods ...the Carrier's responsibility shall instead be subject to COGSA, but where COGSA is found not to be applicable such responsibility shall be determined by the provisions of 3 (2) below".

[134] The court in concluding this cited *Tapco Nigeria Ltd. v. M/V Westwind*, 702 F. 2d 1252 at 1255 (5th Cir. 1983).

The Court defined "proper delivery" as discharge of the cargo "upon a fit and customary wharf"[135] and, also it includes the general maritime law requirement that a carrier "unload the cargo onto a dock, segregate it by bill of lading and count, put it in a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it".[136] However, such requirements of proper delivery are modified "by custom, regulations, [and] law of the port of destination".[137] Accordingly, the court held that the critical question is "Whether delivery was to persons charged by law and the usage of the port with the duty to receive cargo and distribute it to the consignee".[138] COGSA also refers to "delivery", which commences the running of a one- year limitations period. Therefore, the court adopted its interpretation to this phrase in *Servicios- Expoarma C.A. v. Industrial Maritime Carriers Inc.*,[139] and stated that "when such delivery occurs varies according to the custom and laws of a port but that "delivery" is not equivalent to receipt by the consignee".[140]

The court in interpreting the Harter Act phrase "proper delivery" with respect to inland portion of a through bill of lading, reviewed the decisions of two district courts.[141] In *Jagenberg, Inc. v. Georgia Ports Auth.*,[142] it noted the complication raised by a through bill in relation to the interpretation of the phrase "proper delivery" and stated that "The contract was intermodal, meaning that [Atlantic] contracted with Jagenberg to transport the goods over sea from The Netherlands, and then over land to... Macon, Georgia... Macon was the place at which a consignee or its 'agent'.... first encountered the cargo. Consequently, the Court must either extend the reach of the Harter Act- a maritime law- to

---

[135] See *Tapco Nigeria Ltd. v. M/V Westwind*, ibid., and *Metropolian Wholesale Supply, Inc. v. M/V Royal Rainbow*, 12 F. 3d 58 at 61, 1994 AMC 1435 (5th Cir. 1994).
[136] See *Tapco Nigeria Ltd. v. M/V Westwind*, *ibid.*, and *Metropolian Wholesale Supply, Inc. v. M/V Royal Rainbow*, *ibid.*
[137] See *Tapco Nigeria Ltd. v. M/V Westwind*, *ibid.*
[138] See *supra* fn. 132 at 592.
[139] 135 F. 3d 984 at 993, 1998 AMC 1453 (5th Cir. 1998).
[140] See *supra* fn. 132 at 592.
[141] This is because of the absence of any circuit opinion in that respect.
[142] See *supra* fn. 110.

the point of delivery in Macon, Georgia, or it must find some principled manner of deciding when a proper delivery occurred beforehand, despite the fact that, technically, no agent of Jagenberg had a reasonable opportunity to take the goods into 'proper care and custody' before they reached Macon".[143] The court then held that inland transportation under a through bill occurs after proper delivery under the Harter Act. The Court based its conclusion on the maritime nature of the Harter Act "The Harter Act is at core a maritime law; the Court is unwilling to rule that simply because private parties enter an intermodal agreement federal maritime legislation is thus extended far beyond its congressionally intended bounds. The Harter Act is designed solely to regulate the liability of seagoing carriers. That said, the Court finds that the Harter Act does reach to the point at which goods are loaded onto the vehicles of an inland trucker, whether hired by the shipper or the carrier".[144] However, the court held that proper delivery under the Harter Act precedes that inland transport and added that "The Court finds that it advisable to keep sea carriers to the standards imposed by the Harter Act until goods are in the hands of land carriers and actually leaving the maritime arena. With COGSA covering carrier's legal responsibilities through discharge, Harter fills a potential gap between discharge and inland transit in those situations where the goods, though on the dock, are still within the control and responsibility of the sea carrier".[145]

The conclusion in *Jagenberg, Inc.*, was adopted by the court in *Colgate Palmolive Co. v. M/V Atlantic Conveyor*,[146] where it held that "Proper delivery occurs when the cargo is ready for inland transport" and so the Harter Act does not cover inland transportation. The Court of Appeals for the Fifth Circuit in *Mannesman Demag Corrp. v. M/V Concert*

---

[143] *Ibid.* at 1077.
[144] *Ibid.* at 1077- 78.
[145] *Ibid.* at 1079. However, the court found that the damage occurred at port before loading onto inland-bound trucks, and thus, the proper delivery had not yet occurred. *Ibid.* at 1077.
[146] 1996 AMC 1478, U.S. LEXIS 19247, at [14] (S.D.N.Y Dec. 31, 1996).

Express[147] agreed with these decisions and added "We do not preclude parties from contractually limiting liability during the entire time in which the carrier has custody or control over the cargo. We merely hold that where parties contractually tie such limitation to the extent that the Harter Act is compulsorily applicable, the limitation does not apply to inland transportation in through bills of lading. A contrary result extends the compulsory applicability of the Harter Act to transportation that Congress almost certainly did not intend to include within that [A]ct".

The ill- drafting of the through bills of lading, in particular clause 3 (1)[148] the Period of Responsibility clause, in *Mannesman Demag Corrp. v. M/V Concert Express* and *Jagenberg. Inc.*, and of similar clauses in *Colgate Palmolive Co. v. M/V Atlantic Conveyor*, and *Jagenberg, Inc. v. Georgia Ports Auth.*, was the reason why the benefits afforded by COGSA could not be to inland carriers. This can be avoided by better wording of the terms of through bills of lading as in *Tokio Marine & Fire Ins. Co., ltd. v. Hyundai Merchant Marine Co., Ltd.*,[149] where the through bill of lading provided, *inter alia*, that "when the goods are in the custody of the inland carrier it shall be entitled to all the ... limitations of and exoneration from liability... granted to the carrier".[150] The court, then held that "Here, however, the terms of the [through] bill of lading explicitly limit the liability of *all* carriers to $ 500. Thus, regardless of in whose shoes Hyundai stands--whether as inland or ocean carrier-- Mitsubishi is entitled to no more than $ 500. Put another way, Hyundai's failure to notify the inland carrier did not injure the plaintiff [Mitsubishi]".[151]

American courts have accepted that a bill of lading may extend its benefits to third parties through the Himalaya Clause, if the bill's language clearly expresses the intent to

---

[147] See *supra* fn. 132 at 595.
[148] Clause 3 (1) which provides that "If and to the extent that the provisions of the Harter Act ..... would otherwise be compulsorily applicable to regulate the Carrier's responsibility for the goods .....the Carrier's responsibility shall instead be subject to COGSA, but where COGSA is found not to be applicable such responsibility shall be determined by the provisions of 3 (2) below".
[149] See *supra* fn. 130.
[150] *Ibid.* at 1309.
[151] *Ibid.* at 1310.

do so. The criteria referred to, previously,[152] to decide whether the wording of the Himalaya clause covered stevedores or terminal operators as third parties, would, also, be used in respect of an inland carrier.

The court in *Taisho Marine & Fire Insurance Co., Ltd. v. The Vessel "GLADIOLUS"*[153] stated that "Whether an entity is an intended beneficiary of a Himalaya Clause depends upon the contractual relation between the party seeking protection and the ocean carrier, as well as the nature of the services performed compared to the carrier's responsibilities under the carriage contract". Accordingly, the court, in respect of the inland truckers, held that "The undisputed facts show that ABF [inland truckers] was hired by Foster- Wheeler [the consignee], was performing a non- maritime function after the carrier's obligations under its carriage contract had ended, and was rendering services under the terms and conditions of its own bill of lading".[154] Therefore, the inland truckers were independent contractors of the consignee rather than agents, servants or independent contractors of the ocean carrier.

The court in *Taisho Marine and Fire Insurance Co., Ltd. v. Maersk Line*,[155] using the Ninth Circuit's factors in *Taisho Marine & Fire Insurance Co., Ltd. v. The Vessel "GLADIOLUS"* concluded that the inland carrier was engaged directly by the ocean carrier and the through bill of lading was intended to cover the shipment of the cargo from Tokyo to the container yard in Chicago. Therefore the inland portion of transport was within the scope of the ocean carrier's contractual obligation under the through bill of lading. The court supported its conclusion by reference to the non- issuance of a separate bill of lading

---

[152] See *supra* fns. 118- 127.
[153] See *supra* fn. 111 at 1367. This case, however, did not involve with a though carriage of goods by sea and so was not cover by a through bill of lading.
[154] *Ibid.* at 1367- 1368.
[155] 796 F. Supp. 336, 1993 AMC 704 (N.D.Ill 1992). This case, however, involved with a though carriage of goods by sea and so was cover by a through bill of lading issued by the ocean carrier.

by the inland carrier to cover its portion of the transport.[156] Finally, the court held that "As an agent engaged by [the ocean carrier] to perform services within the direct scope of that responsibility, [inland carrier] must perforce be viewed as an intended beneficiary of [the ocean carrier's] Himalaya Clause".[157] Therefore, the court in *Canon U.S.A Inc. v. Norfolk Southern Railway Co.*,[158] refused to allow the terminal operator to have the package limitation on the ground that it was engaged by an intermediate rail contractor and so it was not a sub- contractor of the ocean carrier. Also, the court in *Tokio Marine & Fire Ins., Co. v. Nippon Yusen Kaisha Lines*,[159] held that the Himalaya clause which covers every "agent and subcontractor" of the carrier, only extends to parties with a direct contractual relationship with the carrier.

In contrast, the Fourth Circuit in *Caterpillar Overseas S.A. v. Marine Transport Inc.*,[160] held, in comparison with stevedore services, that the inland portion of transport was not non- maritime operating and added that "This is a far different situation than that of the stevedore whose services are rendered in the terminal facilities while engaged in actually loading directly the cargo on the ship. Stevedoring is essentially a maritime trade. Transporting cargo down a group of public highways for a stretch of miles, on the contrary, is not a normal maritime operation".[161] The court in *Tiasho Marine and Fire Insurance Co., Ltd. v. Maersk Line*,[162] concluded that *Caterpillar Overseas S.A.* case does not dictate a different conclusion on the ground that the inland carrier was performing part of the ocean carrier's contractual obligation which he had been permitted to sub- contract

---

[156] *Ibid.* at 340.
[157] *Ibid.*
[158] 936 F. Supp. 968 at 270, 1997 AMC 1510.
[159] 466 F. Supp. 212, 1979 AMC 2577 (W.D.Wash. 1979).
[160] 900 F. 2d 714, 1991 AMC 75 (4th Cir. 1990).
[161] *Ibid.* at 726.
[162] See *supra* fn. 155.

then to sub- contractor. Moreover, the inland carrier was claiming the benefit of the bill of lading's provision that extended limited liability beyond COGSA.[163]

Recently, the Court of Appeals for the Eleventh Circuit in *James N. Kirby v. Norfolk Southern Railway*,[164] discussed the effect of the Himalaya Clause as to extend the benefits of COGSA to an inland carrier. It held, on the ground of the wording of the Himalaya Clause in the bill of lading issued by freight forwarder, ICC, that the Himalaya clause did not identify Norfolk Southern, the defendant, as a sub- sub- contractor of the carrier and so as a member of "well- defined class of readily identifiable persons" entitled to claim the benefits of the clause. One could argue, therefore, that the Court of Appeals for the Eleventh Circuit in *James N. Kirby v. Norfolk Southern Railway*, based its decision of the requirement of privity and ignored to some extent the requirement that the inland carrier was performing the ICC's contractual responsibilities under the carriage contract. Accordingly, to allow the inland carrier to have the benefits furnished by COGSA's provisions the Himalaya Clause should either identify the inland carrier in the class description as "inland carrier", in line with clause in *Tokio Marine & Fire Ins. Co., ltd. v. Hyundai Merchant Marine Co., Ltd.*, or in line with the clause in *Uncle Ben's v. Hapag-Lloyd Aktiengesesellschaft*,[165] which provides that it is "for the benefit of the servants, employees and agents of the carrier as well as of such independent contractors (*including their servants, employees and agents*) whose services the carrier from time to time may engage".

As result, one could argue that American courts are divided in respect of the interpretation of the Himalaya Clause. For instance, on one hand, the phrase "sub-contractor" in the Himalaya Clause was held to encompass an inland carrier in *Taisho Marine and Fire Insurance Co., Ltd. v. Maersk Line*. On the other hand, the phrase "sub-

---

[163] *Ibid.* 341.
[164] See *supra* fn. 114 at 1310- 1311 fn. 11.
[165] 855 F. 2d 215 at 218 n. 2 (5th Cir. 1988).

contractors" was held not to encompass an inland carrier in *Lucky- Goldstar Intern. (America) Inc. v. S/S California Mercury*,[166] where the court held that the parties would use the phrase "inland carriers" instead "sub- contractors" if they really intended to extend the benefit of the Himalaya Clause to inland carriers. Accordingly, the court in *Tokio Marine & Fire Ins. Co., ltd. v. Hyundai Merchant Marine Co., Ltd.*, extended the benefit of the Himalaya Clause to the participating land carrier on the ground of para. 27 which appeared to qualify the Himalaya Clause and provided that "when the goods are in the custody of the Inland Carrier it shall be entitle to all the ... limitations of and exoneration from liability... granted to the carrier".[167] Moreover, the phrase "independent contractor" would encompass stevedores and terminal operators but not a non- maritime carrier as in *Caterpillar Overseas S.A. v. Marine Transport Inc*. Furthermore, courts would apply state law rather than the provisions of the bill of lading as in *Colgate Palmolive Co. v. S/S Dart Canada*,[168] where the court applied the state law and invalidated any COGSA provisions which conflicted with the state law. Other courts have applied both state law and the provisions of the bills of lading, as in *Taisho Marine and Fire Insurance Co., Ltd. v. Maersk Line.*[169]

Nonetheless, one could argue that an inland carrier might be able to claim the benefits furnished by COGSA's provisions under the Himalaya Clause of the ocean carrier's bill of lading. This is because the inland carrier might not have issued its own bill of lading, but might, instead, have acted under the ocean carrier's bill as in *James N. Kirby v. Norfolk Southern Railway*. The terms of the freight forwarder's bill of lading would normally put the shipper of the goods on notice that the freight forwarder would have to employ other entities to transport the goods to their final destination. For instance, the terms of ICC's bill expressly states that ICC was undertaking "to perform ... the entire

---

[166] 750 F. Supp. 141 at 145 (S.D.N.Y 1990).
[167] See *supra* fn. 130 at 1309.
[168] 724 F. 2d 313 at 315- 316 (2d Cir. 1983).
[169] See *supra* fn. 155 at 342- 343.

transport," or "in [its] own name to procure the performance the entire transport" which might be considered as an implied authority to sub- bail the goods to another entity to transport them to the final destination. Accordingly, the ocean carrier would be the sub-bailee of the goods and so the land carrier would be able to claim the benefits of the Himalaya Clause contained in the ocean carrier's bill of lading rather than the freight forwarder's bill. In contrast, if the inland carrier issues its own bill of lading, the terms of the sub- bailment will be the terms of the inland carrier's bill of lading.

6. 6. 2. FORUM SELECTION AND CHOICE OF LAW CLAUSES

Forum selection and choice of law clauses are *prima facie* valid and enforceable. The Supreme Court in *M/V Bremen v. Zapata Off-Shore Co.*,[170] held that the court must enforce the parties' contractual choice of forum unless the plaintiff can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching".[171] When these clauses are contained in a bill of lading governed by COGSA, they violate COGSA and are unenforceable if the substantive law to be applied lessens the carrier's liability below what COGSA guarantees. This is because COGSA applies *ex proprio vigore* to all bills of lading for shipments of goods to or from a United States port in foreign trade and so enforcing these clauses would be considered as lessening the carrier's liability under s. 1303 (8).

On the one hand, under English law, third party beneficiaries would not be able claim the benefit of the exclusive jurisdiction clause by reason of the Himalaya clause contained in the bill of lading, as in *The Mahkutai.*[172] Because an exclusive jurisdiction clause does not benefit only one party but it is "a clause which creates mutual rights and

---

[170] 407 U. S. 1, at 15, 92 S. Ct. 1907 (1972).
[171] The court in *Vimar Seguros y Reaseguros, S.A. v M/V Sky Reefer*, 515 U. S. 528 at 533, 115 S. Ct. 2322 (1995), extended the rationale of *M/S Bremen* to international forum selection clause contained in bills of lading.
[172] See *supra* fn. 37.

obligations".[173] Even, re- drafting the Himalaya clause as to extend the benefit of an exclusive jurisdiction clause to such third parties might be doubtful in the light of the Privy's Council decision in *The Mahkutai*.

On the other hand, an American court in *Acciai Speciali Terni USA, Inc. v. M/V Berane*,[174] considered the issue of whether a third party, a discharging stevedore, can claim the benefit of the choice of forum clause by virtue of the Himalaya Clause contained in the bill of lading. In general, the Himalaya Clause extends "every right, exemption from liability, defence and immunity" that the carrier's enjoy under the bill of lading to the carrier's agents, servants and independent contractors while acting in the course of or in connection within the scope of their employment. It was not disputed that the defendant was an agent of the carrier, acting in the course of its employment when the cargo was allegedly damaged. The issue before the court in *Acciai Speciali Terni USA, Inc. v. M/V Berane*, came before another district court in *LPR, SRL v. Challenger Overseas, LLC*,[175] where it was held that "The Himalaya Clause applies to defences and the usual understanding of a forum selection clause is that it is a defence to an action, and such a clause is normally raised as a defence". It, then, added that "Indeed, it would be odd for an action against a carrier to be brought in one jurisdiction and another action, arising out of the very same dispute, to be brought against the carrier's local agent in an entirely different jurisdiction".[176]

Based on the former decision, the court in *Acciai Speciali Terni USA, Inc. v. M/V Berane*,[177] held that the parties could not have envisioned that the carrier and its agent would be sued in different jurisdiction when the loss of or the damage of the cargo arose out of the same shipment. Moreover, the court in *Acciai Speciali Terni USA, Inc. v. M/V*

---

[173] *Ibid.* at 13.
[174] See *supra* fn. 112.
[175] 2000 U. S. Dist. LEXIS 9746 at [14] , 2000 AMC 2887 (S.D.N.Y July 7, 2000)
[176] *Ibid.* at [15].
[177] See *supra* fn. 112 at 464.

Berane,[178] held that "The bills of lading evince no intent by the parties to confer immunity from all jurisdiction on the intended beneficiaries of the Himalaya Clauses" and therefore, the court granted the discharging stevedore a conditional dismissal "submission to jurisdiction in the appropriate court(s) and its waiver of any time limitation defences otherwise applicable there".[179] The court based its decision on *CBJ, Inc. v. M/V "Hanjin Hong Kong", et al.*,[180] which imposed similar conditions on dismissal of claims against a "Himalaya" beneficiary relying on a forum selection clause. As a result, under American law, third party beneficiaries, such as stevedores, would be able to claim the benefit of the choice of forum clause by reason of the Himalaya clause contained in the bill of lading.

6. 6. 3. THE PROPOSED BILL TO AMEND COGSA 1936

If the Congress enacts the Proposed Bill Amendments to COGSA much of the discussion here would become moot. This is because the amended act would automatically extend the benefits as well as the responsibilities available under COGSA to almost everyone performing any of the carrier's functions under the carriage contract without the use of the Himalaya clause.[181] The Proposed Bill adopts the statutory Himalaya clause whereby the Rules will be extended, by virtue of the broad definition of the "performing carrier", to include the ocean carrier, stevedore, terminal operator, freight forwarder, etc.

Under the Proposed Bill, an independent contractor, whether he is an ocean carrier, a stevedore, a terminal operator or a freight forwarder, will be able to invoke the Rules against the cargo owner's claim. The broadness of the period of responsibility under the Proposed Bill would intensify the ability of these people to have the benefit of the Proposed Bill during transhipment, loading operation, discharge operation and any other

---

[178] *Ibid.* at 465.
[179] See *Kanematsu USA, Inc. v. M/V Pretty Prosperity*, 2000 U. S. Dist. LEXIS 10000 at [2- 3] (E.D. La. July 2, 2000) where the court. also, gave similar conditional dismissal.
[180] 2000 U. S. Dist. LEXIS 20288, at [6] (D.N. Jer. Sept. 22, 2000).
[181] See *Benedict on Admiralty*, Volume 2A at para. 169 [F].

operation which is supplementary operation to the carriage contract. Therefore, the enactment of the Proposed bill will be considered as an advantage over COGSA 1971 which only solves the problem of the carrier's servants or agents but not the problem of his independent contractors who need to recourse to another mechanism such as implied contract or the doctrine of bailment on terms, under English law.

6. 7. NON- CONTRACTUAL CLAIMS UNDER INTERNATIONAL CONVENTIONS

6. 7. 1. NON- CONTRACTUAL CLAIMS UNDER THE HAGUE AND HAGUE-VISBY RULES

It has been noted that, the Hague Rules did not have any provision in respect of non-contractual claims[182] but the draftsmen of the Hague- Visby Rules realised the importance of such a provision and thus, the Rules provide a new provision which resolved the problem of suing the carrier, or his servants or agents in tort. Therefore, by virtue of art. IV bis (1) of the Hague- Visby Rules, the defences and limits of liability, in these Rules, would be available to the carrier in respect of loss or damage to the goods in any action whether it be founded in contract or in tort. By virtue of art. IV bis (2) of the Rules, the defences and limits of liability which are available to the carrier would also be available to the carrier's servant or agent, who not being an independent contractor, whether the action is founded in contract or in tort. But the ability of the carrier's servants or agents is conditional and therefore, the carrier's servants or agents, by virtue of art. IV bis (4),

[182] However, under English law the cargo owner who has a contractual relationship with the carrier would not be able to sue the carrier in tort and so, the cargo owner could not circumvent the provisions of his contract with the carrier including the Hague Rules. Therefore, cargo owners tried to avoid that by suing the carrier's servants or agents in tort. Carriers then responded by inserting a clause, the Himalaya clause, in the carriage contract to extend the benefit of the Rules to a third party.

would lose the benefit of art. IV bis (2) in case of an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.[183]

The next question which would be considered is the meaning of the terms "servants" or "agents" in art. IV bis (2) of the Hague- Visby Rules. It has been noted that art. IV bis (2) of the Rules reversed the principle in the *Adler .v. Dickson*,[184] where the passenger, as a plaintiff, sued the carrier's servants, the master and the boatswain, who were responsible for the state of gangway. The carrier was exempted from all liability according to the ticket's conditions. The Court of Appeal held that the carrier's servants were not protected by those exemption clauses since they were not parties to the contract of carriage. There is no problem in respect of the construction of the term "servant" but the construction of the term "agent" might cause a problem because of the qualifying words "not being independent contractor". It is hard as a matter of English law to conceive of any agent, capable of being held liable in respect of carriage of goods by sea, who is not an independent contractor.[185] Therefore, it is important to decide the line which should be drawn to distinguish between an agent who is protected by art. IV bis (2) and an agent who would be considered as an independent contractor and so not protected by the Rules. On the one hand, the master could be considered as an agent to the carrier when he is performing certain function, such as signing the bill of lading and the ship's manager could

---

[183] The circumstances in which the carrier's servants or agents would lose the protection of art. IV bis (2) are similar to those in art. IV 5 (e), but the carrier would only lose the protection of the package limitation and not the other defences, such as the time- bar in art. III (6), while the carrier's servants or agents would lose the protection of the package limitation including the other defences which would be available to the carrier in similar circumstances, such as the time- bar in art. III (6) since art IV bis (2) the only article which enables them to such defences. However, this issue was raised in *The Captain Gregos (No 2)*, [1990] 1 Lloyd's Rep. 310 at 316, but without decision. For opposite point view see Boyd, S. C., (*et al*), *Scrutton on Charterparties and Bills of Lading*, 20th Edition, London: Sweet & Maxwell 1996, at p. 456.

[184] [1955] 1 Q.B. 158.

[185] However, the French text of the 1968 Protocol provides no light regarding the intention of the draftsmen or the construction of the term "agents" in art. IV bis (2) of the Rules. In the sub- committee on Bill of Lading Clauses there was an idea that distinction should be drawn between the carrier's servants and agents on one hand and an independent contractors on the other hand, but the minority of the sub- committee considered that the former group should be protected for social reasons while the latter should not protected since those reason do not apply to them. The majority of the sub- committee tried to provide an independent contractor with the same protection but however, it seems that the minority proposal prevailed.

also be considered as well as an agent to the carrier. On the other hand, stevedores and terminal operators would be considered as independent contractors and so would not be protected by art. IV bis (2) of the Rules.

In respect of the period of time in which the protection would be available to the servants or agents in art. IV bis (2) of the Rules should be, according to arts. I (e) and II, between loading and discharge. But, would the carrier's servants or agents be protected by virtue of art. IV bis (2) where they are handling goods in a quay or in a warehouse at the port of loading or discharge? Thus, it is important to extend the period of responsibility to include periods more than the "tackle to tackle" period in order to provide the carrier's servants or agents with the protection of art. IV bis (2). But, would those who are protected in art. IV bis (2) be protected for liability occurring outside the period of responsibility "tackle to tackle" since the protection under this article would only be effective where the Rules have the "force of law"? It is arguable that there would be no protection for the carrier's servants or agents for liability occurring outside the particular period of responsibility, unless there is a clause, such as Himalaya clause, in the bill of lading contract which would extend that period to include period before loading and after discharge in order to allow them the protection of art. IV bis (2) which would only be granted by that clause. Furthermore, the protection of art. IV bis (2) would only have a contractual effect in respect of the period outside the "tackle to tackle" period of responsibility. Moreover, the protection of art. IV bis (2) would be available to the servants or agents only where they are acting in the course of their employment. This requirement is not an expressed one but it should be implied.

An independent contractor, such as a stevedore, would not be protected by art. IV bis (2) of the Rules and so the decision of the Court of Appeal in *Midland Silicones .v.*

Scruttons,[186] would be preserved. Therefore, an independent contractor, such as a stevedore or a terminal operator, would only be protected by the terms of the bill of lading including the Hague Rules where the conditions which entitled the stevedores, in *The Eurymedon*,[187] to the protection given by the bill of lading are satisfied. These conditions are: a clear intention that the protection would be extended to an independent contractor, the carrier is acting as an agent to the independent contractor as well as principal for his own, a proof that the carrier has authority to act on behalf of the independent contractor. However, later ratification would be enough for this purpose. Finally, there should be consideration from the independent contractor side for the protection to be extended. However, it is arguable that the period of responsibility should be extended to include period before loading and after loading in order to allow the independent contractor the benefit of the Hague Rules granted by the Himalaya clause since the period of responsibility under the Rules, by virtue of arts. I (e) and II, is restricted to the "tackle to tackle" period. Therefore, the independent contractor would be protected against any liability which occurred outside the period under the Rules.

However, an independent contractor, such as a stevedore, may now be protected by s. 6 (5) (b) of the Contracts (Rights of Third Parties) 1999 Act. Therefore, the efficacy of Himalaya clause is finally recognised by legislative reform which provides a simpler and more certain mechanism for reaching the same result reached by *The Eurymedon* and other similar cases. But a clause for expanding the period of responsibility to include operations outside the "tackle to tackle" period is till needed in order to provide satisfactory result and to satisfy the enactment of the 1999 Act.

---

[186] [1962] A.C. 446.
[187] *New Zealand Shipping .v. Satterthwaite & Co.* (*The Eurymedon*), [1975] A.C. 154.

6. 7. 2. NON- CONTRACTUAL CLAIMS UNDER THE HAMBURG RULES

The draftsmen of the Hamburg Rules used almost the same language as the Hague- Visby Rules in respect of the protection of the carrier's servants and agents. But, as the same time the Hamburg Rules escaped the criticisms which appeared in art. IV bis (2) of the Hague-Visby Rules. The absence of the words " such servant or agent not being an independent contractor" in art. 7 (2) of the Hamburg Rules might allow an independent contractor, such as stevedore, the benefit of the protection art. 7 (2).[188]

Moreover, stevedore's liability, as an independent contractor, which occurred before loading and after discharge would be covered by art. 7 (2) of the Hamburg Rule, since the period of responsibility, by virtue of art. 4, would cover the whole period as long as the carrier has control over the goods and so this period is wider than the one under the Hague Rules. Even if the stevedore, as an independent contractor, is not protected under art. 7 (2), there would be no need, as is the case with the Hague Rules, to draft the clause so as to extend the period of responsibility to include periods before loading and after discharge in order to provide him with protection which would be granted by the Himalaya clause.

The protection granted to the carrier's servants or agents is not exclusive but it is conditional. Thus, they would have no such protection unless they were acting in the scope of their employment. But, could this condition restrict the ability of the an independent contractor to rely upon art. 7 (2) of the Hamburg Rules, since an independent contractor is obliged to produce a result but without restriction to the way of performing or producing that result? However, this condition could be interpreted in a positive way by the courts which would lead to a satisfactory result. Thus, an independent contractor, such as a

---

[188] See Force, R., "A Comparison of the U.S. Carriage of Goods by Sea Act- Present text and Proposed Changes- and the Hamburg Rules" in Honka, H., (*et al*) *New Carriage of Goods by Sea- The Nordic Approach Including Comparisons with Some Other Jurisdictions*, Institute of Maritime and Commercial Law: Abo Akademi University 1997, at p. 397.

stevedore, would be acting out of the scope of his employment if he did some thing not related to his work as a stevedore and so deprive him of the benefit of that protection.[189]

However, the carrier's servants and agents are protected under the Hamburg Rules by virtue of art. 7 (2), which provides no specific exclusion of independent contractors. Article 7 (2) of the Hamburg Rules is similar to art. 28 (2) of CMR and under English law the terms "servants and agents" excludes independent contractors. Therefore, the enactment of the Rules will have the same effect as to exclude independent contractors, since the comments on this article notes that there is no specific exclusion of independent contractors form art. 7 (2) because to do so was regarded as superfluous and even ambiguous. However, this type of independent contractor, under English law, is protected by virtue of s. 6 (5) of the 1999 Act.

6. 8. NON- CONTRACTUAL CLAIMS UNDER THE DRAFT INSTRUMENT

The protection of sub- contractors under International Conventions for sea carriage has been unsatisfactory for several reasons. First, The Hague- Visby Rules offers protection only to 'servants and agents' of the carrier while the Hamburg Rules extend such protection to sub- carriers, the 'actual carrier' at the price of imposing their liability regime on them. Therefore, other independent contractors remain unprotected. Secondly, the period of responsibility covered by such Conventions, the Hague- Visby Rules apply 'tackle to tackle' while the Hamburg Rules apply 'port to port'. The Draft Instrument, as will be shown, goes beyond both Conventions in its concept of the 'performing party'. Not only is such a party is entitled to the carrier's exceptions and limitations under the Draft Instrument, it is also subjected to the same liability regime to the extent it physically

---

[189] For more detail see Mankabady, S., "Comments on the Hamburg Rules" in The Hamburg Rules on the Carriage of Goods by Sea, (Mankabady, S(Ed) Leyden/ Bosten: A. W. Sijthoff [1978] at p. 64- 71 and Gronfors, K., "Non- contractual claims under The Hamburg Rules" in *The Humbug Rules on the carriage of goods by sea* (Samir Mankabady (Ed,), Leyden and Boston: A. W. Sijthoff [1978] at p. 187.

performs the contractual services for which the carrier is responsible. The Draft Instrument primarily focuses on 'door to door' transport which makes it more straightforward for carriage incorporate its provision, than would be the case with the Hamburg Rules.[190] However, a 'Himalaya' clause would still be needed to cover a 'performing party' who was neither a servant or an agent of the carrier, nor an 'actual carrier', as only such parties are protected by the Hamburg Rules. Further difficulty would arise with 'door to door' transport, an option for which art. 4 (2) (1) of the Draft instrument provides. These difficulties mean that the Draft instrument could not work well with either the Hague-Visby Rules or the Hamburg Rules. It could only work well if, as its drafters intend, it constitutes an exclusive and self- contained code. The provisions of article 6, relating to the 'performing party', will now be examined in more detail.

Under art. 6 (3) (1) (a) a performing party is "entitled to the carrier's rights and immunities provided by this instrument (i) during the period in which it has custody of the goods; and (ii) at any other time to the extent it is participating in the performance of any of the activities contemplated by the contract of carriage" Sub- paragraph (b) provides that it remains entitled to those immunities even if the carrier has agreed to assume responsibilities other than those imposed on it by the Draft Instrument. Article 6 (3) (3) goes on to provide that "If an action is brought against any person, other than the carrier, mentioned in article 6. 3. 2.[191] that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if it proves that it acted within the scope of its contract, employment or agency". This covers a wider range of persons than performing parties, including parties who merely undertake to perform any of

---

[190] A complicating factor, however, is that the Hamburg Rules contain no equivalent to art. V of the Hague-Visby Rules.

[191] This refers not only to a performing party but to "any other person, including a performing party's sub-contractors and agents, who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control".

the carrier's responsibilities. However, art. 6 (3) (2) only confers the benefit of 'defences and limitations of liability' on such persons, unlike art. 6 (3) (1) (a) which entitles the performing party to the carrier's 'rights' as well as its 'immunities' under the Draft Instrument. It is uncertain whether a 'performing party' acquires the right to rely on jurisdiction and choice of law clauses under these provisions because such a 'right' does not seem to derive from the Draft Instrument itself but rather from the terms of the contract of carriage.

It should be noted that the protection offered to a 'performing party' under the Draft instrument is tied to the carrier's period of responsibility. This is because a 'performing party' is defined in art. 1 (17) as one who 'physically performs any of the carrier's responsibilities under a contract of carriage'. Therefore, the problem in *Raymond Burke Motors Ltd.*, still exists under the Draft Instrument if the time at which the carrier has 'received' the goods under art. 4 (1) (1) is defined under art. 4 (1) (2) in accordance with the 'tackle to tackle' rule. A term to this effect in the carriage contract would be perfectly valid under art. 4 (1) (2) and in such a situation the terminal operator would have to protect itself either by contracting on the basis that contract of carriage would be such that the carrier would accept that it had received the goods at the same time as the terminal operator, with the terminal operator indemnifying the carrier for any liability arising between receipt and the start of loading.

This problem would not arise under the 1991 UN Convention on the Liability of Operators of Transport Terminals in International Trade which is not yet in force. This covers the provision of 'transport- related services'[192] by an 'operator of a transport terminal' who, under art. 3, is responsible for the goods "from the time he has taken them

---

[192] These include "storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing". Accordingly, a non- bailee stevedore would fall within the Convention. They would be performing 'transport- related services with respect to the goods in an area under his control or in respect of which he has a right of access or use' in art. I (a).

in charge until the time he has handled them over to or has placed them at the disposal of the person entitled to take delivery of them". This period is based on services provided by the terminal operator and is not tied to the carrier's period of responsibility. Under art. 5 liability of the operator is on the basis of presumed fault with a two- tier limitation figure under art. 6. The Convention also contains a two- year time bar, another important difference from the Draft Instrument. For this reason the UNCITRAL Working Group has noted the need to take into account the provisions of the Convention when drafting the provisions relating to a 'performing party'.

Article 6 (10) deals with non- contractual claims, as follows "The defences and limits of liability provided for in this instrument and the responsibilities imposed by this instrument apply in any action against the carrier or a performing party for loss of, for damage to, or in connection with the goods covered by a contract of carriage, whether the action is founded in contract, in tort, or otherwise". However, art. 6 (10) omits the persons mentioned in art. 6 (3) (2) (a) (ii) as 'any other person, including a performing party's sub-contractors and agents' and so the cargo owner might choose to sue such other person in tort which might strip them of the benefit of the defences and the limitations of liability available under art. 6 (3) (3). As a result, it is arguable that art. 6 (10) should be re- drafted as to include 'any other person, including a performing party's sub- contractors and agents' as well as the performing party. Alternatively, the reference to 'an action' in art. 6 (3) (3) could be replaced by the wording used in art. 6 (10), namely 'any action .... whether the action is founded in contract, in tort, or otherwise'.

6. 9. CONCLUSION

There is a set of defendants, as a result of the exclusion of independent contractors from the ambit of COGSA 1971, who do not have contractual relationships with the cargo

owner and who seek to rely on defences created by their contracts. Also, there is a set of litigants who, as a result of being outside the ambit of the COGSA 1992, are trying to enforce the rights and the obligations of the bill of lading. How satisfactorily have the English courts dealt with these two sets of participants in the process of the carriage of goods by sea?

Four avenues are open to the courts in addressing this problem; implied contract, the 1999 Act, negligence and bailment. The implied contract theory is unlikely to be of much use as a result of the restrictions imposed by the courts. As regards the 1999 Act, clauses that attempt to confer rights of action under s. 1 (3) are likely to be ineffective by reason of s. 6 (5). As regards negligence, litigants without a contractual cause of action should not be encouraged to sue a third party involved in the performance of the carriage contract in tort which would allow them to escape the defences and limitations, such as the Hague- Visby Rules.[193] Moreover, suing in tort would not be available to litigants without ownership or constructive possession at the time where the loss of or damage to the goods occurred. *The Starsin* and *The Aliakmon* highlight the problems posed to claimants by this rules. A potential solution can be found in bailment and the doctrines of bailment and the sub- bailment on terms for the following reasons. Firstly, as an effective formula to frustrate the cargo owner's aim to escape the limitation of the carriage contract by suing a third party involved in the performance of the carriage contract, in tort.[194] Secondly, as an effective formula to enable cargo owner, as being outside the ambit of COGSA 1992, to have the rights and the obligations of the bill of lading contract, such as the cargo owner in possession of an electronic bill of lading which is not included by the 1992 Act since it is

---

[193] The cargo owner would be able to recover damages in full by suing in tort, but he would not be able to recover pure economic loss. In contrast, this loss can, arguably, be recovered under the doctrine of bailment and the assessment of this loss is preferable to be on a contractual basis. This is because bailment and sub-bailment have a contractual flavour.

[194] As where the cargo owner is in possession of either a charterer's bill of lading who want sue the shipowner or the initial carrier's bill of lading who wants to sue the sub- carrier for the loss or damage to goods after transhipment.

neither in a written form nor is signed.[195] Thirdly, bailment enables a successor in title, who could not sue in tort, to sue the wrongdoer, although the requirement of attorment might be considered as an obstacle. Finally, jurisdiction and choice of law clauses, which cannot be relied on by means of the statutory Himalaya clauses, can be relied on under the doctrine of sub- bailment on terms.

The above reasons could be considered as the policy behind the application of the doctrine of bailment and sub- bailment on terms. However, this policy would not be secured without legislative or judicial blockage to the cargo owner's right to sue exclusively in negligence to avoid being bound by the terms of the bailment or sub-bailment. Nevertheless, the bailment and the sub- bailment on terms doctrines contain problems which might reduce their productivity. First, the requirement of attornment by the bailee or his bailee to the successor in title of the original shipper which Lord Brandon, in *The Aliakmon*, considered to be the basis of establishing a bailment relationship between the shipowners and the buyer. Therefore, taking delivery against the bill of lading would not constitute an attornment, since it can not be seen as an express undertaking by the bailee to hold the goods on behalf of the successor in title. Moreover, the establishment of an attornment would be hard in the case of a chain of sub- bailees, since the cargo owner would not be able to prove that the loss or damage to the goods occurred while they were in the attorning bailee's custody. However, it has been suggested that, delivery of the goods without presentation of the bill or delivery the goods against documents which are not included by the 1992 Act so as to trigger the application of s. 1 (2) of the 1992 Act might be considered by the courts as an attornment so minimising this problem. Secondly, there can be no attornment in the event of non- delivery and, no claim in bailment by a successor in title. Thirdly, it may be difficult to infer an express, an implied or an

[195] Or a cargo owner in possession of other documents such as a freight forwarder's bill of lading, because of the uncertainty of the qualification of these types of documents as documents of title and being included by the provisions of the 1992 Act.

ostensible authority on the cargo owner's side.[196] The Privy Council, in *The Pioneer Container*, provides no answer to these cases, which might leave a place for the application to the *dictum* of Donaldson, J., in *Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd.* This is because of the imbalance between the existence of the bailee's and sub-bailee's duty which is based on a factual determination, whereas the bailee's and sub-bailee's ability to rely on the defences is based on a consensual determination.

Sub- bailment on terms would not introduce any kind of help to non- bailees, such as stevedores, who have no contractual relationship with the cargo owner, as an independent contractor, and no intention to acquire from him legal possession of the goods. In contrast, the same doctrine would be useful for a person, such as a warehouseman, who would be qualified as a sub- bailee of the goods and he could invoke the terms of his contract with the principal bailee against the principal bailor where the requirements of the sub- bailment are fulfilled. However, an independent contractor, such as a stevedore, is protected by virtue of s. 6 (5) (b) of the 1999 Act where the requirements of s. 1 (3) are satisfied. However, jurisdiction and choice of law clauses are not available to such an independent contractor under the 1999 Act. It remains to be seen whether these clauses can be effectively redrafted to avoid the decision of the Privy Council in *Mahkutai*.[197]

A bailment relationship, under US law, arises when goods are delivered by one party to another for a specific purpose, and the other party accepts the goods with the express or implied promise that the goods will be returned after the purpose of delivery has been fulfilled.[198] The courts have established that the carrier will be considered as a bailee, under federal bailment law, where COGSA is inapplicable to a particular party or under

---

[196] However, there is an argument which provides that, the bailor's consent is not needed for the inclusion of the terms of bailment and sub- bailment where they are reasonable and expected in their context on the ground of the agency principle. See Glass, D. A., " Bailment on terms and circular indemnity- *Spectra .v. Hayesoak*" [1997] LMCLQ. 478.

[197] See *Privity of Contract: Contracts for the Benefit of Third Parties*: Law Com. No. 242 (1996). For more details about the Proposed Bill see Girvin, S. A., "The Law Commission's Draft Contracts (Rights of Third Parties) Bill and the carriage of goods by sea" [1996] LMCLQ. 541.

[198] See *Benedict on Admiralty*, Volume 8 at para. 19. 07 [A].

particular circumstances. Although no formal contract is required to create a bailment relationship, lawful possession and a duty to account for thing as the property of another, is necessary. The federal bailment law, therefore, will be applicable to a shipowner in two situations. First, a shipowner under a charterer's bill of lading might be sued as a bailee for the loss or the damage to the goods during transit. Secondly, a shipowner might also be sue as a bailee for the loss or the damage to the goods during the period before loading or after discharge. On the one hand, the courts, in some cases, did not explore the doctrine of sub-bailment on terms as a ground for the cargo owner to sue the shipowner, under a charterer's bill, but rather granted the shipowner COGSA protections through the use of a Himalaya clause. On the other hand, the courts, in other cases, did not apply the doctrine of sub- bailment on terms as a ground for applying the shipowner's tariff, but rather established a bailment between the cargo owner the shipowner on the terms of the charterer's bill.

The courts also granted the status of bailees to non- carriers such as terminal operators that provide stevedoring services as well as storage services. Nonetheless, the courts are divided as regard the law applicable to the period outside the 'tackle to tackle' period of COGSA. Some courts have applied the state bailment law rather than the federal bailment law, while some courts have applied the federal law rather than the state law. Applying the state law entail the risk of preventing non- carriers, as bailees, of having the benefits of COGSA when they conflict with the applicable state law. Therefore, carriers have attempted to circumvent this problem by extending the application of COGSA to these parties through the use of the Himalaya clause. The Himalaya clause, however, would not be needed by the enactment of the Proposed Bill Amendments to COGSA under US law.

Thus, the solution to the problem of privity of contract doctrine, in respect of actual carriers really needs to be accomplished by legislative reform rather than by judicial creativity.[199] Article 6 (3) (1), 6 (3) (3) and 6 (3) (10) of the Draft Instrument provide a more comprehensive solution to the problem of non- contractual suits against sub-contractors than that provided by the Hamburg Rules, which only protect the sub-carrier.[200] The actual carrier, by virtue of both art. 10 and art. 11, is protected in the same way as the contracting carrier under the Hamburg Rules as well as under the Draft Instrument, by virtue of art. 6 (3) (3). However, by virtue of art. 1 (17) of under the Draft Instrument, unlike the Hamburg Rules, a distinction has been drawn between sub-contractors who actually perform and those who undertake to procure performance of any of the sub- contracted obligations. Therefore, the need to the doctrine of bailment on terms or the implied contract doctrine will be reduced, if not abolished, in that respect under both the Hamburg Rules, by virtue of art. 10 (2), and the Draft Instrument, by virtue of art. 6 (10). However, an independent contractor such as stevedore would not protected under the Hamburg Rules, since such an independent contractor is not included by the definition of carrier's servants or agents, by virtue of art. 7 (2), despite the omission of the words "such servant or agent not being an independent contractor". In contrast, such an independent contractor would be protected under the Draft Instrument, by virtue of art. 1 (17), even though an independent contractor who is performing one of the carrier's obligations other than those specified in that article, such as a security company guarding a container yard, is not included. Therefore, the Himalaya clause protection is still needed for such independent contractors who are not included by the provisions of both of the Hamburg Rules and the Draft Instrument. The prolongation of the period of responsibility under both

---

[199] Whereby Lord Goff of Chieveley, in *The Pioneer Container*, referred to the speech of Viscount Simonds in *Midland Siliconed Ltd. v. Scrutton Ltd.*, [1962] A.C. 446 at 467- 468.

[200] The provisions of the CMI Outline Draft, in respect, are similar to those contained in the US Proposed Bill which relate to the 'performing carrier'.

of the Hamburg Rules and the Draft Instrument, unlike the Hague and Hague- Visby Rules, would provide an independent contractor with the protection which would be granted by the Himalaya clause. However, the period of responsibility under the Draft Instrument, by virtue of art. 4 (1) (1), is wider than that of the Hague and the Hague- Visby Rules 'tackle to tackle', by virtue of art. II, and that of the Hamburg Rules 'port to port', by virtue of art. 4.

GENERAL CONCLUSION

COGSA 1992 has solved the problem of privity associated with cases such as *The Aliakmon*, *The Aramis* and *The Delfini* by increasing the range of cases in which a contractual right to sue the carrier is transferred to the holder of the bills of lading and to the person to delivery is to be made under sea waybills and ship's delivery orders. COGSA 1992, therefore, encourages contracting parties who are not English to provide for their contracts to be governed by English Law, so preventing the loss of shipping and insurance business, litigation and arbitration to the City of London and the national economy.

The interpretation and the construction of bills of lading as a whole, including the carrier's identity and the demise clauses, by the English courts, has led to conflicting results which provide unpredictable guidance for determining the carrier's identity under English law. Therefore, the success of the cargo owner will depend of the accuracy of his initial choice of defendant which is hardly an encouraging prospective. Moreover, the claimants' will still face problems when damage or loss occurs after transhipment and the head bill contains a cesser of liability clause. This highlights the wider problem of how cargo claimants can obtain rights of suit where they fall outside COGSA 1992. The basic privity problem still exists in relation to some shipping documents in particular electronic bills, combined transport bills and bills issued by nvocc's. Then, there is the problem of preventing non- contractual claims from going outside the scope of COGSA 1971.

Four avenues are open to the English courts in addressing these problem; implied contracts, Contracts (Rights of Third Parties) Act 1999, negligence and baliment. The implied contract doctrine is unlikely to be of much use as a result of the restrictions imposed by the English courts in cases such as *The Aramis* and *The Gudermes*. As regards the 1999 Act, clauses that attempt to confer rights of action under s. 1 (3) are likely to be

ineffective by reason of s. 6 (5- 7). Suing in negligence should not be encouraged since it would allow litigants to escape the defences and limitations in COGSA 1971. Moreover, suing in negligence will not always be available in the lights of the problems highlighted by *The Aliakmon* and *The Starsin*. Suing in bailment and sub- bailment on terms may not always be available because of the requirement of attornment by the bailee to the successor in title, the absence of attornment in the case of non- delivery and the difficulty of inferring an express, an implied or an ostensible authority on the cargo owner side. There is also some confusion and uncertainty as to the circumstances in which a third party may rely on a jurisdiction or choice of law clause in either the head contract or the sub- contract. I will conclude by testing eleven specific problems against the prospective both of existing law as well as that of the proposals for reform set out in the Hamburg Rules and the Draft Instrument. As will become apparent, most of the problems under the existing law would be resolved with the implementation of the Draft Instrument.

1- Claimant has an unendorsed order bill- Transferred but not endorsed bill of lading

Such a claimant would not be a 'lawful holder' by virtue s. 5 (2) (b) of the 1992 Act since he is not "a person with possession of the bill as a result of the completion, by delivery of the bill, of any endorsement of the bill" and so he would not be able to sue under s. 2 (1) of the Act. Such a claimant would also not be liable under s. 3 (1) of the 1992 Act since the contractual rights of suit never have been vested in him as a 'lawful holder' of the bill.

Suing in negligence depends on the claimant's having ownership or constructive possession at the time when the loss or damage to the goods occurred. The House of Lords in *The Aliakmon* held that the shipowner's duty of care would only exist towards the owner of the goods at the time of the breach of duty occurred, and this was confirmed by in the House of Lords in *The Starsin*. *The Starsin* highlighted the problem that progressive damage would not create a new cause of action in the hands of a new cargo- owner since

such cause would be completed before the acquirement of title to the cargo. In the light of these difficulties, suing in negligence will not always be available to such a claimant.

Suing in bailment, instead, depends on the establishment of attornment by the bailee to the successor in title. Taking delivery of the goods against the bill would not constitute an attornment, since it cannot be seen as an express undertaking by the bailee to hold the goods on behalf of the successor in title. Moreover, there can be no attornment in the event of non- delivery and, therefore, no claim in bailment by the successor in title, even though the shipper can still sue as in *The Pioneer Container*. However, if an attornment can be established, the successor in title would be able to sue for pre-attornment loss or damage without having to show that it had become successor in title at the time of the loss or damage. Moreover, an attornment would not have the effect of transferring liabilities, such as for shipment of dangerous cargo, of the head bailor to the successor in title. To allow a successor in title to be liable for the head bailor's breach of the duty not to ship dangerous cargo would, in effect, be to impose a strict liability as that party would have had no means of ascertain the condition of the goods. It is, therefore, unlikely the courts would find such a party to be liable as sub- bailee to the shipowner. Taking delivery of the goods against a letter of guarantee which provides that such a claimant is the lawful person to take delivery might constitute an attornment by the bailee and so to allow him sue in bailment.

The Contracts (Rights of Third Parties) 1999 Act would not be applicable to the case of transferred but not endorsed bill of lading or, for that matter, to any other cases covered by bill of lading, sea waybill and ship's delivery order since s. 6 (5) of 1999 Act excludes carriage of goods by sea covered by such documents. However, the implementation of the implied contract doctrine, in such situation, depends on taking delivery of the goods against a letter of guarantee which provides either he is the lawful

person to take delivery or that the bill of lading would be presented as soon as possible, since presentation of the bill of lading will considered as an offer to contract on the terms of the bill of lading and it is an essential to the implementation of the implied contract. Therefore, it is arguable that taking delivery against such letters would support the argument that the shipowner was not merely intending to perform his pre- existing contractual obligation against the original shipper. Moreover, the co- operation between the involved parties by taking off the goods with minimum cost and maximum speed might be taken as a sign of an intention to contract with each other due to the importance of having defined rights against each other. Giving delivery of the goods to such holder might be considered as consideration on the basis that the shipowner has performed his contract with the shipper and so of being discharge of liabilities under that contract. Granting the carrier the benefits of the contractual defences embodied into such document might also be considered as consideration.

Under US law, by virtue of Ch. 801, the transferee's title to the goods and his cause of action depends on the criterion that whether or not the bill of lading has been duly negotiated. Therefore, such a claimant, by virtue of Ch. 801 05 (a) (2), would not have a cause of action since the bill in such case has not been duly negotiated to him.

Under the Draft Instrument, such a claimant would not be a holder, by virtue of art. 1 (12), since the bill of lading has not been duly endorsed to him, and therefore, he would not be able to sue under art. 13 (2). Nonetheless, if there has been an assignment of rights under art. 13 (1) (iii), such a claimant would be able to sue under art. 13 (3), provided that he could prove both that he suffered such loss or damage and that the holder did not suffer such loss or damage.

2- Claimant has lost possession of the bill

The three definitions of a 'lawful holder' in s. 5 (2) of the 1992 Act all refer to a 'person with possession of the bill'. Such a claimant would not be divested of contractual rights of suit under s. 2 (5) and, therefore, he should still be able to sue under s. 2 (1)of the Act, provided that he could prove both that he once had the bill and that there has been no divestment under s. 2 (5). To require proof of continued physical possession of the bill in such a situation would mean that neither such a claimant nor any other person would have title to sue under s. 2 (1). This is clearly undesirable and it is likely, therefore, that the courts would take the view that such claimant in such circumstances would still be able to sue under the 1992 Act. This view can be supported by the language of s. 2 (1) which refers to a person who 'becomes' a 'lawful holder' rather than a person who 'is' a 'lawful holder'. If such a claimant is able to sue under s. 2 (1) of the Act, in these circumstances, he would be liable to the carrier under s. 3 (1), provided that the requirements of that section were satisfied.

Under the US law this problem does not exist since, under Ch. 801 05, the title to the goods and the cause of action depend on one criterion which is whether the bill has been duly negotiated.

Under the Draft Instrument, such a claimant would not be a holder, by virtue of art. 1 (12) (a), since he is not in possession of the bill of lading and, therefore, he would not be able to sue under art. 13 (2). Nonetheless, such a claimant would be able to sue under art. 13 (3), since he is one of the persons referred to in that article as 'without being the holder', provided that he could prove both that he suffered such loss or damage and that the holder did not suffer such loss or damage.

3- Claimant has not yet received the bill

According to Rix J's *obiter dicta*, in *The Giovanna*, such a claimant would have possession of the bill of lading, by virtue of s. 5 (2) (b) of the 1992 Act, once it has been indorsed and handed to couriers for despatch to such a claimant and so he would be able to sue under s. 2 (1) of the Act. The critical issue before such a claimant is to whom the bill of lading was delivered and, therefore, if it was delivered to his agent, the exact moment at which the claimant acquired the contractual rights of suit would be once the bill has been indorsed and delivered to agent, since the concept of possession is a flexible one so as to allow the agent to have actual possession and his principal to have constructive possession. Once such a claimant established that he has acquired the contractual rights to sue under s. 2 (1) he would become liable under s. 3 (1) of the Act, provided that the requirements of that section were satisfied. If such a claimant cannot sue the carrier under s. 2 (1) of the 1992 Act, he may be able sue under the implied contract doctrine, provided that the requirement of the intention and the consideration are satisfied. Therefore, it is arguable that taking delivery against a letter, which provides that the bill of lading would be presented as soon as possible, would support the argument that the shipowner was not merely intending to perform his pre- existing contractual obligation against the original shipper. Such a claimant can sue in negligence or in bailment, if the requirements of such claims are satisfied as has already been discussed in the case of a claimant who holds an unendorsed order bill.

Under US law, this problem does not exist since, under Ch. 801 05, the title to the goods and the cause of action depend on one criterion which is whether the bill has been duly negotiated rather than being the holder in possession of the bill.

Under the Draft Instrument, the position of such a claimant would the same as a claimant who has lost possession of the bill and, therefore, he would be able to sue under

art. 13 (3), since he is one of the persons referred to in that article as 'without being the holder', provided that he could prove both that he suffered such loss or damage and that the holder did not suffer such loss or damage.

4- Claimant suffers loss but is not the holder of the bill

By virtue of s. 2 (5) of 1992 Act, the shipper's rights, as an original party, are extinguished where the rights of suit are transferred to the holder of the bill by virtue of s. 2 (1) of 1992 Act. The shipper might need to sue the carrier for his own loss in cases such as, where he has sold the goods at his risk but parted with the property. Although, the holder of the bill, by virtue of s. 2 (4) of 1992 Act, can recover substantial damages from the carrier for the benefit of the person who had suffered the loss such as the shipper, the holder might not be able to recover substantial damages for the shipper's benefit, in the above case, since the latter might not qualify as a person with an interest or right to the goods according to s. 2 (4) (a) of 1992 Act. However, the shipper as an original party can still sue for the benefit of a third party who had suffered loss according to the rule of *Dunlop .v. Lambert* as an exception to the common law rules, provided that his original contract is not contained in or evidenced by the charter- party. The shipper's ability to recover substantial damages was restricted by the decision in *The Albazero*. But, a separate exception was recognised in *The Sanix Ace* whereby the shipper may recover substantial damages in contract or tort provided that he still the owner of the goods at the time of breach, notwithstanding that risk has passed to a third party. The shipper's rights of suit under the bill of lading are extinguished by virtue of s. 2 (5) of the 1992 Act.

The holder of the bill can sue the carrier for the benefit of the shipper or the third party who has suffered loss as a result of the carrier's breach of the carriage contract under s. 2 (4) of the 1992 Act. Recovery of damages for the shipper under s 2 (4) depends on how the English courts interpret the words 'interest or right' in these situations.

Consequently, there is a risk that s. 2 (4) would not be available to the buyer where the risk of loss has passed on shipment, but the property has not passed yet or for the shipper who have sold the goods at his risk and parted with the property or where he wished to claim against the carrier for losses for breach of the contract such as delay in loading on the ground that neither the shipper nor the buyer is "a person with any interest or right in or in relation to goods to which the document relates". Section 2 (4) of the 1992 Act allows the holder to sue the carrier for the benefit of the person who had suffered loss as a result of the carrier's breach of the carriage contract without providing a machinery for such person to compel the holder to exercise those rights. Moreover, the shipper might be the only person with a cause of action, but without a right to recover substantial damages for the person who had suffered loss in cases such as where the bill had never been transferred so as to give the latter a cause of action according to s. 2 (1) of 1992 Act.

On the one hand, under US law, there is no provision in respect of the shipper's rights when the bill of lading is negotiated to a third party, by virtue of Ch. 801. The shipper can still sue, under US law, if he is able to produce evidence that the bill has not been negotiated so as to give the cause of action to a third party. Therefore, the shipper will be able to recover substantial damages for his own loss as well as for the loss suffered by a third party without a cause of action. On the other hand, under US law there is also no corresponding section to s. 2 (4) of the 1992 Act in Ch. 801. Nonetheless, the ability of the holder to recover substantial damages for the loss suffered by a third party without a cause of action, under US law can, arguably, be compared with the position of the transferee of a non- negotiable bill and, therefore, a holder would be able to recover substantial damages for his own loss as well as for the loss suffered by such a claimant by virtue of being only the holder of the bill.

Under the Draft Instrument, a claimant who suffers loss, a shipper or a consignee and their assigns, without being the holder of the bill would be able to sue the carrier under art. 13 (3), provided that he could prove both that he suffered such loss or damage and that the holder did not suffer such loss or damage. As a result, the co- operation of the holder of the bill is not needed under art. 13 (3) of the CMI Outline Draft, unlike s. 2 (4) of the 1992 Act as well as without the restrictions imposed by the words 'interest or right'.

5- Electronic bill of lading

The application of the 1992 Act to electronic bill of lading is, by virtue of s. 1 (5), conditional on regulations made by the Secretary of State. No such regulations have yet been made. Moreover, s. 7 of the Electronic Communication Act 2000 cannot solve the problem of title to sue for bills of lading in that it cannot allow electronic bills to be treated as 'bills of lading' for the purpose of the 1992 Act, even if it enables them to achieve recognition as documents of title. The provisions of the Contracts (Rights of Third Parties) 1999 Act are not applicable to a carriage contract embodied into an electronic bill, by virtue of s. 6 (6), on the ground that the provisions of the 1992 Act include this bill.

Nevertheless, if both the requirement of consideration and the rigid application of that requirement by English courts undermined the application of the novation of the carriage contract adopted by the Bolero system, the doctrine of implied contract might well provide a possible solution to the problems of privity. Under the doctrine of implied contract, a contract would be implied from the conduct of both the consignee and the carrier. The involvement of the 'Title Registry' of the Bolero system as the carrier's agent in the electronic equivalent of endorsement does seem to place the Bolero situation closer to the facts of *The Captain Gregos (No. 2)* than to those of *The Aramis*. This is because in *The Captain Gregos (No. 2)*, BP neither paid the freight or undertook to pay it, nor was there evidence that BP knew that the freight was outstanding. Also, BP neither presented

the bills of lading to the shipowners to take delivery nor undertook to do so latter. These facts would arguably support the present of a contractual intention and therefore the delivery of the goods to the transferee of the Bolero bill of lading by the carrier would not be considered as a performance of a pre- existing obligation. Suing the shipowner in negligence would mean that the transferee would face the problems highlighted by both *The Alaikmon* and *The Starsin*, which have already been discussed.

The involvement of the shipowner in the process of transmitting the private codes, directly or indirectly through its 'Title Registry', under the Bolero system, to enable the transferee to take delivery of the goods might well constitute an acknowledgement by the shipowner to the transferee's possessory title to the goods represented by the electronic bill. Such acknowledgement by the shipowner might be considered as an attornment by the shipowner, as a bailee, to the transferee and so giving the transferee rights of suit in bailment. Moreover, there can be no attornment in the event of non- delivery and, therefore, no claim in bailment by the successor in title, even though the shipper can still sue as in *The Pioneer Container*. Moreover, an attornment would not have the effect of transferring liabilities, such as for shipment of dangerous cargo, of the head bailor to the successor in title. Therefore, suit by the shipowner would only workable if the implied contract or the novation is adopted as in the Bolero system. This is because the problem of maintaining liability of the original shipper under the Bolero system, by virtue of novation, might be challenged under the English law and so the English courts might well decide to invalidate any maintaining of the original shipper's liabilities such as in respect of dangerous cargo.

Under the Hamburg Rules, the bill of lading can be signed electronically and it would still be governed by the Rules. Therefore, the Bolero bill of lading might well be governed by the Rules on the ground that it is no more than a document 'other than a bill

of lading' issued by the carrier, which evidence the conclusion of a carriage contract and the taking over of the goods by the carrier, by virtue of art. 18, and signed electronically in accordance with art. 14 of the Rules.

Under US law, such a bill is not covered by the provisions of Ch. 801 nor by the provisions of COGSA 1936. The enactment of article 7 of UCC would convert such a bill to a document of title so as to be covered only by the provisions of COGSA 1936, but not Ch. 801 as it is not a negotiable bill.

Under the Draft Instrument, electronic bill of lading is treated in the same way as an orthodox bill of lading and so both of art. 12 (2) (1 & 2) and art. 13 would be applicable to an electronic bill.

6- Combined transport documents

The combined transport document might be not included by the provisions of 1992 Act on the basis that it does not contain or evidence a carriage contact *exclusively* by sea. However, the 1992 Act, by virtue of s. 1 (1) (a), states that this Act applies to "any bill of lading" and s. 5 (1) (a) defines the carriage contract as "the contract contained in or evidenced by that bill". One could, accordingly, argue that the combined effect of these sections is to make the Act applicable to *any* bill as long as the carriage contract is contained in or evidenced by such bill regardless of whether such carriage contract covers a carriage *wholly* or *partly* by sea. Nonetheless, the restriction, mentioned above, might be applicable to sea waybills and ship's delivery orders, since the definitions of these documents are connected to carriage contract by sea. The Contracts (Rights of Third Parties) 1999 Act is not applicable to such document. On the one hand, such documents would not be within the exception of s. 6 (5) (a) of the 1999 Act since it would not cover a carriage contract *wholly* by sea. On the other hand, such document would might be within the exception of s. 6 (5) (b) since a carriage contract covers party by sea and another mode

of transport might be governed by international convention which have the force of law under other legislation which could be applicable to the whole of the multimodal transport operation such as the conventions on road and rail carriage.

Therefore, if both of the 1999 Act and the 1992 Act are not applicable to a combined transport document, the implied contract doctrine would be viable method to regulate the relationship between the involved parties under such documents. Nonetheless, the utility of the doctrine of implied contract was reduced by the decisions of the Court of Appeal in *The Aramis* as well as in *The Gudermes*. This is because the existence of a contractual intention has a significant role in relation to the implementation of implied contract doctrine. Moreover, in the light of the difficulties imposed by *The Aliakmon* and *The Starsin*, suing in negligence will not always be available to a successor in title, such a claimant. Suing in bailment, instead, depends on the establishment of attornment by the bailee to the successor in title. Taking delivery of the goods against this document would not constitute an attornment, since it cannot be seen as an express undertaking by the bailee to hold the goods on behalf of the successor in title.

The implied contract doctrine would still be needed as a means of imposing *liabilities* on the transferee of such document, even if the 1999 Act is applicable to the combined transport documents. This is because the 1999 Act can only confer *rights* on a third parties but not liabilities. Moreover, an attornment would not have the effect of transferring liabilities, such as for shipment of dangerous cargo, of the head bailor to the successor in title.

Under the US law, qualifying the combined transport document as a true bill of lading so as to be included by the provisions of Ch. 801 might be problematic. However, such document is included by the provisions of the Proposed Bill whereby the carriage is performed by the contracting carrier or by a performing carrier who is performing the

ocean part of the carriage contract. Therefore, the combined effect of the provisions of both the Proposed Bill and Ch. 801 might allow the application of these provisions to such document under US law.

The definition of the carriage contract, by virtue of art. 1 (6) of the Hamburg Rules, would include the carriage of goods partly be sea 'only in so far as it relates to carriage by sea'. Therefore, the Hamburg Rules would not cover the whole carriage which is covered by a combined bill of lading.

The combined transport document would probably considered as a negotiable transport document under the Draft Instrument. This is because the definition the carriage contract under art. 1 (5) as to include carriage of goods partly by sea from one place to another. Moreover, there is no reference to any particular form of document under art. 13 but rather to 'contract of carriage' as defined in art. 1 (5).

7- Charterer's bill of lading

A claimant suing the shipowner under charterer's bill of lading in bailment would require the courts to hold that there had been an attornment to the successor in title. Delivery of the goods would not constitute an attornment under a shipowner's bill, there is no reason why it should not do so under charterer's bill of lading, even though in the case of non- delivery there would be no attornment and so no bailment. Suing the shipowner under a charterer's bill in accordance to the implied contract doctrine might arguably be difficult. This because it is difficult to say that the shipowner have any lien to give up when delivering cargo carried under such bill. Moreover, *Hain Steamship Co. Ltd. v. Tale & Lyle Ltd.* shows a judicial unwillingness to imply *quantum meruit* freight when the shipowner still has an express right to recover freight under a charter- party. Nonetheless, suing the shipowner under charterer's bill in negligence requires the claimant to show that the breach comes after the acquisition of ownership or possession. Moreover, an action in negligence will not

always be available to the claimant in the light of the difficulties highlighted by *The Aliakmon* and *The Starsin*.

Can the shipowner, when sued non- contractually, rely on the terms of such bill? The bailment on terms, unlike sub- bailment on terms, will not be subject to the jurisdiction and choice of law clauses under such bill as in *The Forum Craftsman* and *The Makhutai*. The other possibility is that the shipowner will be able to rely on the terms of the charterer's bill on the basis of the Himalaya clause whose its effectiveness has been recently proven in *The Starsin*. The reason in *The Makhutai* will still apply so as the shipowner will not be able to rely on both jurisdiction and choice of law clause. Although, a third party such as the shipowner under the charterer's bill of lading will be able to rely on a Himalaya clause, by virtue of s. 1 (1) (a) and s. 1 (6) of the 1999 Act, as to avail himself of the exclusion and limitation of liability clauses into the bill of lading, the shipowner will not be able to rely on either jurisdiction or choice of law clause.

The next question is whether the shipowner, when charterers' bills have been issued, could sue the cargo owner for the loss or the damage caused to their vessel. What is uncertain, though, is whether an attornment has the effect of transferring liabilities of the head bailor, such as liability for the shipment of dangerous cargo, as well as its rights of suit. To allow a successor in title to be liable for the bailor's breach of such duty would, in effect, be to impose a strict liability as that party would have had no means of ascertaining the condition of the cargo. It is, therefore, unlikely that the courts would find such a party to be liable as sub- bailor to the shipowners. In any event, the cargo owner would not be liable to the shipowners for the loss or the damage caused by dangerous cargo, even if an implied contract was implied by the court between the shipowners and the cargo owner as in *The Athanasia Comninos*.

Moreover, the shipowner under a charterer's bill of lading will not be able to have rights of suit as against the cargo owner by virtue of Contracts (Rights of Third Parties) Act 1999. This is because the 1999 Act is not applicable to a contract of carriage of goods contained in or evidenced by a bill of lading, by virtue of s. 6 (5) (a). Moreover, the 1999 Act will not assist the shipowner who wished to assert positive rights under the charterer's bill of lading and, therefore, it will not impose any liabilities on third parties, even if it is applicable to such cases, but would only operate as to confer the benefits of carriage contract to such person. A Himalaya clause would only operate to give the shipowner a right to sue the cargo owner for dangerous cargo, if it was worded in a different way from the usual clause and, if the courts were prepared to extent what is already a very artificial doctrine to this new situation.

Under US law, the shipowner will have the benefit the defences and the limitations of liability provided for in the Proposed Bill, by virtue of ss. 3 and 4 and the Enaction Clause.

Under both the Hamburg Rules and the Draft Instrument, by virtue of art. 10 and art. 11 and art. 8 (2) (4) and art. 6 (10) respectively, the shipowner will have the benefit of the defences and the limitations of liability provided for in these Instrument. The shipowner, as a 'performing party' is entitled to the carrier's rights under art. 6 (3) (1) (a). But he will not be able to sue the cargo owner for the shipment of dangerous cargo under art. 7 (1), if the phrase 'carrier' is only confined and referred the carrier so as excluding the performing party.

8- NVOCC bill of lading

This bill is essentially the same as the charterer's bill and, therefore, it should be treated as in the same way under the 1992 Act. However, such bill, if not treated as a true bill, falls within the sea waybill sections of the 1992 Act. Nonetheless, such bill will not be treated

as a sea waybill if it was issued in a negotiable form. As a result of such uncertainty, the freight forwarder might be considered as a bailee on the ground of having contractual control over the goods, even if he has no physical custody of them as in *Spectra International Plc. v. Hayesoak Ltd.* The need of attornment could create a problem to the successor in title in the case of a chain of sub- bailees. However, this problem, arguably, might be resolved by considering the delivery of the goods against those bills to the successor in title as attornment that would be upon the head bailee's instruction, which would also be bound to the sub- bailee. Suing in negligence, under such bill, is subject to the problems already discussed in connection with the claimant who holds an unendorsed 'order' bill. A contract can be implied between the successor in title and the NVOCC on the basis that taking delivery was against the ocean bill issued by the shipowner as agent to the NVOCC.

Under the Hamburg Rules, art. 1 (1) defines the carrier as "any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper" which should include a non- sea carrier such as NVOCC. Article 1 (7) of the Hamburg Rules defines the bill as "a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against the surrender of the document...". This wording is probably broad enough to cover bill of lading whose status is still doubtful under the 1992 Act, such as freight forwarder bills.

The definition of the carrier under the Draft Instrument, by virtue of art. 1 (1) as "a person that enters into a contract of carriage with a shipper" is such that it can include a non sea carrier such as NVOCC. By virtue of art. 13 (2), a party who falls outside the four categories in art. 13 (1) will still be able to sue on the carriage contract. To do so they must be the holder of a 'negotiable transport instrument'. A 'holder' is defined in art. 1 (12) in

similar terms as adopted by s. 5 (2) (b) and (c) of the 1992 Act. A 'negotiable transport document' is defined in art. 1 (14) as a 'transport document that indicate, by wording such as "to order" or "negotiable" or other appropriate wording recognised as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "non- negotiable" or "not negotiable".' This wording is probably broad enough to cover a bill of lading whose status is still doubtful under the 1992 Act, such as a freight forwarder bill.

9- Transhipment with a cesser of liability clause

Assuming the loss occurs on the second voyage, the claimant will not be able to sue the first carrier in bailment since the bailment of the goods ends on the transhipment of the goods to the second carrier. Also, the claimant will not be able to sue the first carrier in accordance to the implied contract doctrine since the delivery of the goods made by the second carrier. Suing in negligence will not be also available because of the absence of any breach of the duty to take care of the goods.

Suing the second carrier in negligence, the claimant must show that the breach of the duty to take care of the goods occurs after the acquisition of ownership or possession. An action in negligence will not always be available to the claimant in the light of the difficulties highlighted by *The Aliakmon* and *The Starsin*. Suing the second carrier in accordance to the implied contract doctrine might arguably be difficult. The is because it difficult to say that the shipowner have any lien to give up when delivering cargo carried. Also, the requirement of contractual intention would be hard to satisfy, since the conduct of the involved parties by taking delivery might not be consistent with a new contract to be implied and inconsistent with no such contract to be implied. The claimant will be able to sue the second carrier in bailment on terms of the sub- bailment provided the courts to hold

that there had been an attornment to the successor in title. Delivering the goods to the holder of the first carrier's bill of lading might be viewed as an attornment to the holder of that bill so as to found a claim in bailment in respect of the post- transhipment events, provided that the sub- carrier is aware that the goods belong not to the first carrier. The second carrier will not have the benefit of jurisdiction and choice of law clauses as a result of the Privy Council in *The Pioneer Container*. The 1999 Act will not give rights of suit to the claimant under the second bill since such documents still fall within the 1992 Act. The answer to the question whether the shipowner can sue the cargo owner for the loss or the damage caused to their vessel, will be the same as when the shipowner is suing the cargo owner under a charterer's bill.

Under the Hamburg Rules, the claimant will be able to sue the second carrier as an 'actual carrier' under art. 11. Nonetheless, the claimant will still be able to sue the first carrier if a claim against the second carrier cannot be instituted in a competent court under art. 21 (1 or 2), by virtue art. 11 (1).

Under the Draft Instrument, the first shipowner will still be liable to the cargo owner as the contracting carrier, unless there is an 'express' agreement to cesser of liability under art. 4 (3) (1). In any event, the second carrier will be liable to the cargo owner as a performing party and will have the benefit of defences and limitations of liability under the Instrument.

10- Claimant sues sub- contractor of contractual carrier

The claimant will be able to sue the sub- contractor of the contractual carrier in accordance with the doctrine of sub- bailment on terms, provided that the consent requirement is satisfied as in *The Pioneer Container* and provided the sub- contractor is a sub- bailee. The sub- bailee's duties may be modified or negated by reference to the terms of the sub-bailment in their contract with the bailee so as jurisdiction and choice of law clauses in

their contract would be available to the sub- bailee as against the claimant. Nonetheless, the claimant may still be able to base its claim exclusively on the general duty of care in negligence. One of the justifications of the departure from the general rules of *Donoghue v. Stevenson* by the House of Lords in *The Nicholas H* was that the fact that the imposition of a duty of care would undermine the uniformity of international conventions on liability, such as the Hague rules, and on limitation of liability. Therefore, such a justification should be considered as the policy reason for denying the existence of a general duty of care in circumstances where there is a duty of care in bailment.

Another method to avoid the problem of parallel actions in negligence and bailment would be through the Himalaya clause. A Himalaya clause would only provide such sub-contractor with the benefit of the exceptions and limitations terms and so jurisdiction and choice of law would not be available as in *The Makhutai*. The protection of such clauses can be extended to sub- contractors only by means of redrafting the 'Himalaya' so as to avoid the linguistic problems highlighted in *The Makhutai*. The Contracts (Rights of Third Parties) 1999 Act is not applicable to carriage contracts by sea, by virtue of s. 6 (5- 7) but its provisions can be used to provide a sub- contractor, such as a stevedore (who will not have a legal possession and therefore not a bailee) with the benefit of 'exceptions' and 'limitations' in the contract of carriage. Redrafting the 'Himalaya' clause is still needed, though, to avoid the problems highlighted in *The Makhutai* and extent the benefit of jurisdiction and choice of law clauses to sub- contractors.

Under the Hamburg Rules, the sub- contractor will have the benefit of the Rules as the 'actual' carrier under both art. 10 and art. 11. However, independent contractors such as stevedores will still need the protection of the 'Himalaya' clause since such sub-contractors will not be protected under the Rules by virtue of art. 7 (2).

Under the Draft Instrument, a sub- contractor who is included within the definition of the 'performing party', art. 1 (17), will have the benefit of the carrier's rights and immunities provided by this Instrument under art. 6 (3) (1) (a). Sub- contractors will still need Himalaya clauses to rely on jurisdiction and choice of law clauses since such clauses are not covered by the Draft Instrument but rather by virtue of a Himalaya clause. If the sub- contractor is not covered by the definition of the 'performing party, under art. 1 (17), they will still be able to have the carrier's defences and limitations of liability provided under the Instrument, by virtue of art. 6 (3) (3). This is because such sub- contractors can be classified as 'any other person' under art. 6 (3) (2) (a) (ii).

11- Claimant is an endorsee of a bill for goods which are never shipped

The claimant in this case will not have a cause of action against the carrier under s. 2 (1) of the 1992 Act, by virtue of s. 4. This is because a third party will be able to rely on s. 4 of the Act if he could prove that the document which he holds is a bill of lading. At common law, if no goods are shipped at all there is no bill of lading and so what purports to be a bill is in fact a mere 'nullity'.

Under the Draft Instrument, the reference is not to a 'bill of lading' but rather to a 'contract of carriage' under s. 13. However, in *Heskell .v. Continental Express Ltd.*, the court held that the issuance of a bill of lading would not constitute a carriage contract, unless the goods were received by the shipowner or his agent for shipment. Therefore, the result under the Draft Instrument would be the same as under the 1992 Act.

Under the Draft Instrument, the cargo owner would be able to sue both the carrier and the performing party which would prevent non- contractual claim to go outside the scope of this instrument. The Draft Instrument will be applicable to the corresponding transactions such as electronic bills of lading and to combined transport bills and

NVOCC's bills. The shipper and the cargo owner will be able to sue for their loss without being the holder of a particular document.

SELECTED BIBLIOGRAPHY

BOOKS

1) Baughen, S., *Shipping Law*, 2nd Edition, Cavendish Press 2001.

2) Bools, Michael D., *The Bill of Lading- A Document of Title to Goods- An Anglo-American Comparison*, 1st Edition, London & Hong Kong: L.L.P. 1997.

3) Boyd, Stewart C., Burrows, Andrew S., and Foxton, David., (*et al*) *Scrutton on Charterparties and Bills of Lading*, 20th Edition, London: Sweet & Maxwell 1996.

4) *Chitty on Contracts*, 28th Edition, Vol. One, General Principles, London: Sweet & Maxwell 1999.

5) Colinvaux, R., *Carver's Carriage by Sea*, 13th Edition, London: Stevens & Sons 1982.

6) Cooke, J., Kimball, J.D., Young, T., Martowski, D., Taylor, A., and Lambert, L., (*et al*) *Voyage Charterers*, London: Lloyd's of London Press Ltd., 1993.

7) D' Arcy, L., Murray, C., Cleave, B., and Others, (*et* al), *Schmitthoff's Export Trade: Law and Practice of International Trade*, 10th Edition, London: Sweet & Maxwell 2000

8) Debattista, C., *Sale of Goods Carried by Sea*, London: Butterworths 1990.

9) De Wit, Ralph., *Multimodal Transport- Carrier Liability and Documentation*, London, New York, Hamburg & Hong Kong: Lloyd's of London Press LTD 1995.

10) Gaskell, N., Asariotis, R., and Baatz, Y., (*et al*), *Bills of Lading: Law and Contracts*, 1st Edition, L.L.P. 2000.

11) Goode, R.M., *Proprietary and Insolvency in Sales Transactions*, 2nd Edition, London: Sweet & Maxwell 1989.

12) Guest, A.G., Ellinger, E.P., Harris, D.R., Lomnicka, Eva., Miller, C.J., Morse, Morse, C.G.J., Reynolds, F.M.B., Sealy, L.S., and Sir Treitel, G., (*et al*), *Benjamin's Sale of Goods*, 6th Edition, London: Sweet & Maxwell 2002.

13) Ivamy, Hardly E R., *Payne and Ivamy's Carriage of Goods by Sea*, 13th Edition, London & Edinburgh: Butterworths 1989.

14) Palmer, N., *Bailment*, 2nd Edition, London: Sweet & Maxwell 1991.

15) Palmer, N., & McKendrick, E., (*et al*) *Interests in Goods*, 2nd Edition, London & Hong Kong: L.L.P. 1998.

16) Proctor, C., *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document*, Pretoria- Interlegal 1997.

17) Sanson, N., "Carriage of Goods by Sea Act 1992- The Practice and Legal Implications" Conference Documentation- IBC Legal Studies and Services Limited Maritime Law Division 1993, SAS Portman Hotel, London W1. 1.

18) Schoenbaum, Thomas J., *Admiralty and Maritime Law*, 2nd Edition, Hornbook Series- West Group 1998.

19) Todd, P., *Cases and Materials on International Trade Law*, 1st Edition, London: Sweet & Maxwell 2003.

20) Todd, P., *Modern Bills of Lading*, 2nd Edition, London: Blackwell Law 1993.

21) Tetley, W., *Marine Cargo Claim*, 3rd Edition, Montreal: International Shipping Publications- BLAIS 1988.

22) Sir Treitel, G., & Reynolds, F.M.B., *Carver on Bills of Lading*, 1st Edition, London: Sweet & Maxwell 2001

23) Wilford, M., Coghlin, T., and Kimball, J., *Time Charters*, 4th. Edition, LLP- London, New York, Hamburg and Hong Kong: Lloyd's of London Press Ltd., 1995.

24) Wilson, John F., *Carriage of Goods by Sea*, 4th Edition, Longman/ Pearson 2001.

Articles

1) Bassindale, J., "Title to Sue- The Penultimate Chapter" [1991] 1 OGLTR. 25.

2) Bassindale, J., "Ownership, Risk and Title to Sue in Oil Trading Contracts" [1988/89]

7 OGLTR. 171.

3) Buaghen, S., "Bailment's Continuing Role in Cargo Claims" [1999] LMCLQ 393.

4) Baughen, S, "Article III rule 8. A Killer Provision" [2002] STLI 14.

5) Baughen, S., "*The Gudermes*- What Future for *Brandt .v. Liverpool* Contract" [1994]

6) Baughen, S., "Contract and Co- operation- *The Gudermes*" [1991] LMCLQ 459.

7) Baughen, S., & Campbell, N., "Apportionment of Risk and the Carriage of Dangerous Cargo" [2001] IML 1.

8) Baughen, S., "Does a 'Freight Prepaid' Bill of Lading Mean What it Says?" [1999] Shipping & Transport Lawyer 12.

9) Baughen, S., "*The Gudermes*- What future for *Brandt .v. Liverpool* ?" [1994] M.L.R. 62.

10) Beatson, J., & Cooper, J.J., "Rights of Suit in Respect of Carriage of Goods by Sea" [1991 LMCLQ 196.

11) Bell, A., "Sub- Bailment on Terms: A New Land Mark- *The Pioneer Container*" [1995] LMCLQ 177.

12) Berlingieri, F., "The Hague- Visby Rules and Actions in Tort" [1991] 107 L.Q.R. 18.

13) Bond, R., "The Future of Electronic Commerce in International Trade" [1999] ITLQ 15.

14) Bradgate, R., & White, F., "The Carriage of Goods by Sea Act 1992" 56 [1993] M.L.R. 188.

15) Burden, K., "EDI and Bills of Lading" [1992] 8 C.L.S.R. 269.

16) B. J. D., "Ownership of Bulk Cargoes- *The Gosforth*" [1986] Lloyd's Maritime and Commerce Law 4.

17) Caplehorn, R., "Bolero.net- Provides New Legal Framework for Electronic Trade" [1999] S & T.L.I. 12.

18) Caplehorn, R., "Bolero.net- The Global Electronic commerce Solution for International Trade" [199] 14 BJIB & FL 421.

19) Carver, TG, "On Some Defects in the Bills of Lading Act 1855" [1890] 6 L.Q.R. 289.

20) Chuah, J., "The Bolero Project- the International Chamber of Commerce's Electronic Bill of Lading Project" [2000] Student Law Review 56.

21) Clarke, M., "A Black Letter Lawyer Looks at Bolero" [1999] ITLQ 69.

22) Clarke, M., "The Consignee's Right of Action Against the Carrier of Goods by Sea, *The Captain Gregos (No. 2)*" [1991] LMCLQ. 5.

23) Cooper, J.J., "Carriage of Goods by Sea Act 1992" 3 [1990] Current Law Statutes Annotated 1992. 50- 01.

24) Davenport, B.J., "Problems in the Bills of Lading Act" 105 [1989] L.Q.R.. 174.

25) Davenport, B.J., "Limits on the Hague Rules" [1989] 105 L.Q.R. 521. J.B.L. 62.

26) Debattista, C., "The Bill of Lading As the Contract of Carriage- A Reassessment of *Leduc .v. Ward*" 45 [1982] M.L.R 652.

27) Del Busto, C., (et al), *Documentary Credits- UCP 500 & 400 Compared-* An Article -by Article Detailed Analysis of the New UCP 500 Compared with the UCP 400, International Chamber of Commerce.

28) De Val, P., "More points on the *Brandt .v. Liverpool* contract- *The Aramis*" 3 [1987] LMCLQ. 255.

29) Devonshire, P., "Sub- Bailment on Terms and the Efficacy of Contractual Defences Against A Non- Contractual Bailor" [1996] J.B.L. 330.

30) Diamond, A., "The Hague- Visby Rules" [1978] LMCLQ. 225.

31) Emerson, V., "The Concept of Negotiability and the Electronic Bill of Lading- An Overview" [2001] 3 J.E.C.L. & P. 10.

32) Faber, D., "The Problems Arising from Multimodal Transport" [1996] LMCLQ 503.

33) Faber, D., "Electronic Bills of Lading" [1996] LMCLQ 232.

34) Force, R., "A Comparison of the US Carriage of Goods by Sea- Present Text and Proposed Changes- and the Hamburg Rules" in *New Carriage of Goods by Sea- The Nordic Approach Including Comparisons with some other Jurisdictions*, (Honka, H., (et al))Institute of Maritime and Commercial Law, Abo Akademi University, 1997.

35) Girvin, S. A., "The Commission's Draft Contracts (Rights of Third Parties) Bill and the Carriage of Goods by Sea" [1997] LMCLQ. 541.

36) Girvin, S.D., "Shipper's Liability for the Carriage of Dangerous Cargoes by Sea" [1996] LMCLQ 487.

37) Glass, D. A., "Bailment on Terms and Circular Indemnity- *Spectra .v. Hayesoak*" [1997] LMCLQ 478.

38) Gronfors, K., "Non- Contractual Claims under the Hamburg Rules" in *The Hamburg Rules on the Carriage of Goods by Sea* (Mankabady, S., (et al), Leyden/ Boston: A.W. Sijthoff 1978, 187.)

39) Hetherington, S., "Freight Forwarders and House Bills of Lading- *The Cape Comorin*"[1992] LMCLQ 32.

40) Hetherington, S., "Freight Forwarders' Liability- *The Oceania Trader*" [1993] L.M.C.L.Q. 313.

41) Howard, T., "The Carriage of Goods by Sea Act 1992" 24 J. Mari. Law & Com. [1993] 181.

42) Humpreys, G., & Higgs, A., "An Overview of the Implication of the Carriage of Goods by Sea Act 1992" [1993] J.B.L.. 61.

43) Lai, M., "Delivery of Cargo without Production of the Original Bill of Lading" 9

[2003] 3 JIML 284.

44) Livermore, J., & Euarjai, K., "Electronic Bills of Lading and Functional Equivalence" [1998] 2 J.I.L.T., <http://elj.warwick.ac.uk/jilt.

45) Sir Lloyd, A., "The Bill of Lading: Do We Really Need it ?" [1989] LMCLQ 47.

46) MacMillan, C., "Elder, Dempster Sails on: Privity of Contract Bailment on Terms- *The Mahkutai*" [1997] LMCLQ 1.

47) Mallon, P., and Tomlinson, A., "Bolero: Electronic 'Bills of lading' and Electronic Contracts of Sale" [1998] I.T.L.Q. 257.

48) Mankabady, S., "Comments on the Hamburg Rules" in *The Hamburg Rules on the Carriage of Goods by Sea* (Mankabady, S., (et al), Leyden/ Boston: A.W. Sijthoff 1978, 27.

49) Martin- Clark, D., "Where are you leading us, *Ranger*", Shipping & Transport Law [2002] 1.

50) Martin- Clark, D., "Straight, but not Straightforward" [2003] 3 Shipping & T.L. 1.

51) McMeel, G., "The Redundancy of Bailment" [2003] L.M.C.L.Q. 169.

52) Mildon, D., & Scorley, D., "Liabilities of the Transferees of Bills of Lading" [1999] IJOSL 94.

53) Nicoll, C. C., "BOLERO Makes the Bill of Lading Obsolete" [1999] Int. M.L. 148.

54) Nilson, A., "Bolero- An Innovative Legal Concept" [1995] 6 Comps. & Law 17.

55) Palmer, N., "Sub- Bailment on Terms" [1988] LMCLQ. 466.

56) Reynolds, B., "Further Thoughts on the Carriage of Goods by Sea Act 1992 (UK)" 25 J. Mari. Law & Com. [1994] 143.

57) Reynolds, F.M.B. "The Carriage of Goods by Sea Act 1992 Put to the Test" [1999] LMCLQ 161.

58) Reynolds, F.M.B., "The Carriage of Goods by Sea Act 1992" [1993] LMCLQ 436.

59) Reynolds, F.M.B., "The significance of Tort in Claims in respect of Carriage by Sea" [1986] L.M.C.L.Q. 97.

60) Richardson, J., "At the Cutting Edge" [1999] S & T.L.I. 14.

61) Rose, F.D., "Liability for Dangerous Goods- *The Giannis*" [1998] LMCLQ 480.

62) Rose, F., "Transhipment and the Hague- Visby Rules- *Mayhew Foods Ltd. v. Overseas Containers Ltd.*" [1984] LMCLQ 202.

63) Sing, K., "Jurisdiction Clauses in Bills of Lading- The Cargo Claimant's Perspective- *The Pioneer Container*" [1995] LMCLQ 183.

64) Sing, K., "Of Straight and Switch Bills of Lading" [1996] L.M.C.L.Q. 416.

65) Sukhninder, P., "The Shipment of Dangerous Goods and Strict Liability" [1998] International Company and Commercial Law Review 1.

66) Swadling, W. J., "Sub- Bailment on Terms- *The Pioneer Container*" [1993] LMCLQ. 9.

67) Thomas, W.H., "Sale of Goods (Amendment) Act 1995" 3 [1995] Current Law Statutes 28- 1.

68) Treitel, G.H., "Passing of property under c.i.f. contracts and the Bills of Lading Act 1855 *The Delfini*" [1990] LMCLQ. 1.

69) Todd, P., "Oil Cargoes and the Bills of Lading Act" [1990] 7 OGLTR. 214.

70) Todd, P., "Dematerialisation of Shipping Documents" [1994] JIBL 410.

71) Todd, P., "*Brandt .v. Liverpool* Doctrine- No Freight or other Charges Paid by Receiver (*The Aramis*)" [1988/89] 2 OGLTR 19.

72) Treitel, G. H., "Bills of Lading: Liabilities of Transferee- *The Berge Sisar*" [2001] L.M.C.L.Q. 345.

73) Treitel, G.H., "Bills of lading and implied contracts" [1989] LMCLQ. 162.

74) Treitel, G.H., "Bills of lading and third parties" [1986] LMCLQ 294.

75) Tricks, S., "The Carriage of Goods by Sea Act 1992" [1991] 12 OGLTR. 385.13) 55)

76) Uiph, J., "The Sale of Goods (Amendment) Act 1995: Co- Ownership and the Regue Seller" [1996] LMCLQ 93.

77) Urbach, A., "The bill of lading : Who Owns the Cargo You Have Just Bought?" [1983/84] 12 OGLTR 267.

78) White, F., & Bradgate, R., "The Survival of The *Brandt .v. Liverpool* Contract, *The Gudermes*" [1993] LMCLQ. 483

79) White, F., & Bradgate, R., "The Survival of the *Brandt .v. Liverpool* contract, *The Gudermes*" [1993] LMCLQ 483.

80) Wilson, J. F., *The Starsin*- Spot the Contractual Carrier" [2001] STLI 4.

81) Wilson, J.F., "A Flexible Contract of Carriage - the Third Party Dimension?" [1996] LMCLQ 187.

82) Wiseman, R.M., "*The Delfini* and its Consequences for CIF Transactions" [1988/89] 8 OGLTR. 220.

Documents

1) The English and Scottish Law Commissions *Rights of Suit in Respect of Carriage by Sea* (1991) English Law Com. No. 196 and Scottish Law Com No. 130

2) UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc. A/CN.9/WG.III/WP.21, (15- 26 April 2002), The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

3) The comments on text of UNCITRAL *Transport Law- Preliminary Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law, Working Group III (Transport Law) Ninth session U.N. Doc.

A/CN.9/WG.III/WP.21/Add.1, (15- 26 April 2002). The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

4) Report of the Working Group on Transport Law on the Work of its ninth session, United Nations Commission on International Trade Law, Thirty- fifth session U.N. Doc. A/CN.9/510, (New York, 17- 28 June 2002). The full text of the document is available on the net; http://www.uncitral.org/en-index.htm.

5) Electronic Commerce: Formal Requirements in Commercial Transactions, Advise from The Law Commission, December 2001. The full text of the document is available on the net; http://www.lawcom.gov.library. Report on

6) The Rulebook of the Bolero System see Bolero Association at http://www.boleroassociation.org/rulebook1, or http://www.boleroassociation.org/dow-docs.htm.

7) The Report Prepared by Allen & Overy and Richards Butler, London, for Bolero International Limited, operators of the Bolero System titled "International Legal feasibility Report", 2nd Edition, November 1997 (updated August and December 1999). The full text of this document is available on the net; at http://www. bolero.net/decision/legal/legal.php3 or http://www. bolero.net/content/search/library.